

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

JAN 16 9 22 AM '04

In the Matter of)
)
General Motors Corporation and)
Hughes Electronics Corporation, Transferors) MB Docket No. 03-124
)
And)
)
The News Corporation Limited, Transferee,)
)
For Authority to Transfer Control)

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 2003

Released: January 14, 2004

By the Commission: Chairman Powell, Commissioners Abernathy and Martin issuing separate statements; Commissioners Copps and Adelstein dissenting and issuing separate statements.

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News Corp.'s relationship with all other MVPDs from that of solely a programming supplier to that of both a supplier of crucial inputs and a direct competitor in the end user MVPD market. As discussed more fully below, our analysis of the principal allegations of competitive harm in the record demonstrates that this vertical integration has the potential to increase the incentive and ability of News Corp. to engage in temporary foreclosure bargaining strategies during carriage negotiations with competing MVPDs for two types of "must have" video programming products -- broadcast television station signals and regional cable programming sports networks -- in order to secure higher prices for its programming.³ Although News Corp., like other broadcast networks, engages or attempts to engage in this sort of behavior today, ownership of a competing MVPD platform with a national footprint means that News Corp. stands to gain from any subscriber losses the affected MVPD suffers during the period of foreclosure when those subscribers move over to its competing MVPD platform to access the desired programming.⁴ The ability to gain revenues via its ownership interest in DirecTV thereby helps offset any temporary losses that News Corp. would suffer from withdrawal of its programming from the competing MVPD in terms of lost advertising and/or affiliate fee revenues. This off-setting revenue gain makes use of the strategy more tolerable to News Corp post-transaction than it was pre-transaction and thereby increases the likelihood and frequency of its use. This lowering of the costs of foreclosure to News Corp. from present levels fundamentally and substantially alters the bargaining dynamic between the program supplier and the competing programming distributor to the benefit of the former at the expense of the latter and its subscribers. To the extent that News Corp. succeeds in using temporary foreclosure strategies to extract supra-competitive prices for its programming, these transaction-specific higher programming costs are likely to be passed through as higher MVPD prices, which in turn would harm consumers.

5. Applicants have alleged, and we have found, various public interest benefits from the transaction, including more potent competition to cable, increased innovation and consumer benefits in terms of programming and services, and increased penetration of local-into-local broadcasting service. Our license conditions described below are designed to lessen the impact of the public interest harms outlined above, while preserving the benefits of the transaction for the public. Based on the record before us, we find that on balance and as conditioned, the subject license transfer approvals will serve the public interest. We therefore grant the Application with the conditions specified below.

³ In this Order, "[REDACTED]" indicates confidential or proprietary information, or analysis based on such information, submitted pursuant to the First and/or Second Protective Orders. See *News Corporation, General Motors Corporation, and Hughes Electronics Corporation, Order Adopting Protective Order*, DA 03-1761 (rel. May 22, 2003); *News Corporation, General Motors Corporation, and Hughes Electronics Corporation, Order Concerning Second Protective Order*, DA 03-2376 (rel. July 22, 2003). The unredacted version of this Order is available upon request only to those parties who have executed and filed with the Commission signed acknowledgements of the Second Protective Order. Qualified representatives who have not yet signed the required acknowledgement may do so in order to obtain the unredacted Order.

⁴ See, e.g., *Most Cable MSOs Get Deals Done on Retransmission Consent*, WARREN'S CABLE REGULATION MONITOR, Jan. 13, 2003; Joanne Ostrow, *Denver ABC Affiliate Engages in Big Dispute with AT&T Broadband*, THE DENVER POST, Dec. 31, 2002; Bruce Orwell and Joe Flint, *Disney, Time Warner Sign Deal, Settling Their Nasty, Public Feud*, WALL ST. J., May 26, 2000.

Liberty Satellite and Technology, Inc. (87%), and minority interests in a number of other companies.¹⁰ Liberty also holds a controlling interest in Astrolink International LLC, and the largest plurality interest in Wildblue Communications, Inc., both Commission licensees authorized to construct, launch and operate satellites using frequencies in the Ka-band.¹¹

7. News Corp. holds its U.S. programming interests through its Fox Entertainment Group, Inc. subsidiary, a Delaware corporation, in which News Corp. currently holds an approximately 80.6% ownership and 97% voting interest.¹² The remaining 19.4% equity is publicly traded on the New York Stock Exchange.¹³ The Fox Entertainment Group, Inc. is principally engaged in the development, production and distribution of television broadcasting and cable network programming.¹⁴ Its programming interests include Fox Broadcasting Company, Fox Television Stations, Twentieth Century Fox Film, Twentieth Century Fox Television, Fox News Channel, and Fox Cable Networks.¹⁵ News Corp. indirectly holds interests in a number of direct-to-home ("DTH") subscription services, all of which operate outside the United States, including a 35% indirect interest in British Sky Broadcasting ("BSkyB"), which operates in the United Kingdom and Ireland.¹⁶ In addition, News Corp. holds an approximately 42.9% interest in Gemstar-TV Guide International, Inc. ("Gemstar"), which, among other things, produces an electronic program guide for on-screen navigation of program offerings.¹⁷ News Corp. also holds an approximately 79% equity interest in NDS Group plc ("NDS"), a supplier of conditional access systems that provide secure solutions for pay television systems.¹⁸

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requested the Commission to require Applicants to provide expert testimony in support of their key economic assertions, including information about assertions concerning the relevant product and geographic markets and the Applicants' market power in these markets. *Id.* at 5-6. On May 13, 2003, the Applicants filed a Decl. of Lawrence A. Jacobs, Executive Vice President and Deputy Counsel to News Corp., to expand and reiterate on Liberty's interest in News Corp. and the proposed transaction. *See* Letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP to Marlene H. Dortch, Secretary, FCC (May 13, 2003), forwarding the Decl. of Lawrence A. Jacobs ("*News Corp. Decl.*") Both the EchoStar Petition to Require Additional Information and the *News Corp. Decl.* were made part of the record of this proceeding.

¹⁰ Companies in which Liberty holds a minority interest include Discovery Communications (50%), OpenTV Corp. (46%), QVC (42%), Sprint PCS Group (19%), and USA Interactive (20%). Liberty also holds less than a one percent interest in the GMH tracking stock issued by GM. *See Liberty 10-K 2002 Annual Report* at I-5, I-21.

¹¹ *Id.* at I-21.

¹² *See News Corp 20-F 2003 Annual Report* at 6, *see also* Fox Entertainment Group, Inc., SEC Form 10-K, Annual Report for the fiscal year ended June 30, 2003 at 1 ("*FEG 10-K 2003 Annual Report*")

¹³ *See FEG 10-K 2003 Annual Report* at 20.

¹⁴ *Id.* at 1-10

¹⁵ *See* Application, Volume I, F for a list of News Corp.'s national and regional cable programming interests in the United States.

¹⁶ *See News Corp 20-F 2003 Annual Report* at 18.

¹⁷ *Id.* at 17.

¹⁸ *Id.* at 19; Application at 10.

C. The Proposed Transaction

9 The transaction will be accomplished in two parts. GM will split off Hughes and divest its interest in Hughes such that Hughes will become a separate and independent company. As a result of these and several related transactions, News Corp. will own a 34% interest in Hughes, and will become the largest single holder of Hughes stock. Three GM employee benefit trusts managed by an independent trustee will own a combined approximately 20% interest in Hughes, and the remaining 46% interest in Hughes will be held by the general public.²⁶

10. *The Split-Off of Hughes.*²⁷ Hughes is currently part of GM. GM has issued a tracking stock, GM Class H common stock ("GMH shares") to investors who wish to "invest" in Hughes. The GMH shares are held by the public and are traded on the New York Stock Exchange ("NYSE"). The total number of GMH shares issued and outstanding as of the date of the Application represented an approximate 80.1% indirect economic interest in the financial performance of Hughes, the largest block of which is held by three GM employee benefit trusts.²⁸ GM itself owns all of the common stock of Hughes, holds all of Hughes' voting power, and retains the remaining approximately 19.9% economic interest in Hughes.²⁹ As one of the first steps of the proposed transaction after the payment by Hughes to GM of a \$275 million dividend, GM will distribute to the holders of GMH shares new shares of Hughes common stock in exchange for the outstanding GMH shares – on a share-for-share basis.³⁰ GM's 19.9% interest in Hughes will be represented by Hughes Class B common stock.³¹

11. *The Stock Purchase*³² Simultaneous with the Hughes split-off, News Corp. will purchase GM's approximately 19.9% interest in Hughes for \$14 per share³³ payable in cash, or, at News Corp. election, up to 20% of the total amount may be paid to GM in News Corp. preferred limited voting ordinary American Depositary Receipts ("ADRs").³⁴

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grant of SES-MOD-20030425-00532). PanAmSat also has notified the Commission of discontinuance of service under its inactive section 214 authorizations. See Application at 5, n.7; FCC Public Notice, 18 FCC Rcd 10552 (2003) (public notice of PanAmSat's intent to surrender authorizations ITC-214-19980102-00004, ITC-93-236, ITC-95-579, ITC-85-221 and ITC-85-069)

²⁶ For details of the proposed transaction, see Application, Volume II, which includes the Separation Agreement, Merger Agreement, and Stock Purchase Agreement; see also Application at 10.

²⁷ See Application, Volume II, Separation Agreement.

²⁸ See Application at 11

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² See Application, Volume II, Stock Purchase Agreement

³³ This will amount to approximately \$3.8 billion, subject to adjustments as described in the Application.

³⁴ See Application at 11

14. The Applicants state that, after the closing of the transaction, Hughes' board of directors will consist of 11 members, of which six will be independent.⁴⁴ The parties have agreed upon an initial slate of directors, all of whom are U.S. citizens and include K. Rupert Murdoch as chairman of the board and Chase Carey as CEO.⁴⁵ The board will have an Audit Committee comprised entirely of independent directors. Among its other functions, the Audit Committee will review and approve all related-party transactions in such amounts and related to such matters as the Audit Committee determines. Accordingly, because News Corp. and its programming vendor subsidiaries would be considered related parties, any transaction they might enter into with Hughes or DirecTV may be subject to review and approval by the Audit Committee.⁴⁶ No single shareholder will have a *de jure* controlling interest in the company either through a majority interest in voting stock or majority representation on the board. Because News Corp. will indirectly control a 34% interest in Hughes and its former employee will be CEO, News Corp., for purposes of the Communications Act, will exercise *de facto* control over Hughes.

III. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

15. The Commission must determine whether the Applicants have demonstrated that the proposed transfer of control of licenses from GM to News Corp. will serve the public interest, convenience, and necessity.⁴⁷ The public interest standard involves a balancing of potential public interest harms of the proposed transaction and the potential public interest benefits.⁴⁸ The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.⁴⁹

16. Our public interest evaluation under Section 310(d) necessarily encompasses the "broad aims of the Communications Act,"⁵⁰ which includes, among other things, preserving and enhancing competition in relevant markets, ensuring that a diversity of voices is made available to the public; and

⁴⁴ *Id*

⁴⁵ There is no corporate governance mechanism that ensures that News Corp. will continue to have four representatives on the board, or that Mr. Murdoch and Mr. Carey will continue to hold the position of chairman and CEO, respectively. See Application at 13, n.23.

⁴⁶ *Id* at 13.

⁴⁷ 47 U.S.C. § 310(d)

⁴⁸ See, e.g., *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp (Transferors) to AT&T Comcast Corp (Transferee)*, 17 FCC Rcd 23246, 23255 (2002) ("*Comcast-AT&T Order*"); see also *EchoStar Communications Corporation, General Motors Corporation, Hughes Electronics Corporation (Transferors) and EchoStar Communications Corporation (Transferees)*, 17 FCC Rcd 20559, 20574 ("*EchoStar-DirecTV HDO*").

⁴⁹ See, e.g., *Comcast-AT&T Order*, 17 FCC Rcd at 23255; *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20574. If we are unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, Section 309(e) of the Act requires that we designate the application for hearing. 47 U.S.C. § 309(e).

⁵⁰ *Comcast-AT&T Order*, 17 FCC Rcd at 23255; *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20575.

IV. COMPLIANCE WITH COMMUNICATIONS ACT AND COMMISSION RULES AND POLICIES

A. Licensing Qualifications

18. *Background.* As a threshold matter, we must determine whether the Applicants meet the requisite qualifications under the Act and our rules.⁵⁷ Among the factors the Commission considers in its public interest review is whether the applicant for a license has the requisite "citizenship, character, financial, technical, and other qualifications."⁵⁸ No issues have been raised in this case that would require us to re-evaluate the basic qualifications of Hughes, the transferor, and we thus find that Hughes is a qualified transferor. As to the qualifications of the transferee, Section 310(d) requires that the Commission consider the qualifications of the proposed transferee as if the transferee were applying for the license directly under Section 308 of the Act.⁵⁹ Therefore, our review of the transferee, News Corp., includes examination of whether News Corp. has the requisite "citizenship, character, and financial, technical, and other qualifications" that we require of all applicants for a Commission license.⁶⁰

19. *Position of Parties.* EchoStar is the only party that challenges News Corp.'s qualifications to be a Commission licensee on the basis of character. EchoStar's assertions relate to a pending criminal investigation, as well as pending civil litigation cases, filed against NDS Group, plc. ("NDS"), a company that is 79% owned by News Corp.⁶¹ EchoStar asserts that NDS is reportedly the subject of a criminal investigation by the U.S. Attorney General's office for, among other things, the willful violation of criminal statutes outlawing the circumvention of disabling of encryption technology (*i.e.*, hacking).⁶² This investigation, according to EchoStar, may possibly lead to criminal indictments resulting in a felony conviction that could implicate the Commission's character policy as to News Corp.'s qualifications.⁶³

20. EchoStar also claims that NDS is the defendant in civil law suits brought by EchoStar, Canal+ (Vivendi Universal), DirecTV, and EchoStar and NagraStar L.L.C. ("NagraStar").⁶⁴ According to EchoStar, these lawsuits involve allegations of, *inter alia*, willful hacking of the security functions of a number of MVPD platforms; unfair competition in the provision of mass media-related services;

⁵⁷ 47 U.S.C. § 310(d)

⁵⁸ See 47 U.S.C. §§ 310(d) and 308.

⁵⁹ See 47 U.S.C. § 308

⁶⁰ News Corp., through its subsidiaries, already holds Commission licenses under Title III. See, e.g., *Applications of UTV of San Francisco, Inc., et al., (Assignors) and Fox Television Stations, Inc. (Assignee) For Consent to the Assignment of Licenses for Stations KBHK-TV, San Francisco, CA, et al.*, 16 FCC Rcd 14975 (2001) ("UTV of San Francisco Order").

⁶¹ EchoStar Petition at 50-57. See also ¶ 7, *supra*

⁶² EchoStar Petition at 50-52. EchoStar asserts that the Attorney General's investigation involves criminal and civil liability under the Digital Millennium Copyright Act and related statutes.

⁶³ *Id.*

⁶⁴ EchoStar Petition at 50, 51, 54. EchoStar notes that Canal + (Vivendi Universal) recently settled its lawsuit against NDS for willful hacking of its encryption software, unfair competition, and violations of the Communications Act of 1934. *Id.* at 55.

governmental units; and (3) violations of antitrust or other laws protecting competition.⁷⁴ The Commission has also stated that it will consider non-FCC related misconduct of the licensee's or applicant's parent or related subsidiary where there is a sufficient nexus between the licensee or applicant and the parent corporation or a related subsidiary.⁷⁵ Further, the Commission has used its character policy in the broadcast area as guidance in resolving similar questions in transfer of common carrier authorizations and other license transfer proceedings.⁷⁶

24. We do not agree with EchoStar that the alleged pending federal criminal investigation and civil cases against NDS warrant disqualification of News Corp. on the basis of character. Unadjudicated non-FCC violations should be resolved by a court with proper jurisdiction and should not be pre-judged by our processes.⁷⁷ Because the investigation and civil cases cited by EchoStar are pending matters, they are irrelevant to News Corp's character qualifications under the Commission's long-held position that there "must be an ultimate adjudication before an appropriate trier of fact, either by a government agency or court, before we will consider the activity in our character determinations."⁷⁸

25. We also do not agree with EchoStar that we should hold this proceeding in abeyance in order to undertake a separate investigation into the matters alleged, or await the outcome of the criminal investigation by the Attorney General's Office.⁷⁹ The cases cited by EchoStar do not persuade us otherwise.⁸⁰ Both of the cases cited by EchoStar involve previous findings by an appropriate trier of fact of misconduct on behalf of the applicant's or licensee's parent.⁸¹ In those cases, the Commission was justified in its decision to delay resolution of the related license applications to allow consideration of the adjudicated misconduct in its license review process. The instant case involves allegations concerning a pending criminal investigation and various pending civil lawsuits, none of which have been finally

⁷⁴ *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179, 1209-10 (1986) ("Character Policy Statement 1986"), modified, 5 FCC Rcd 3252 (1990), recon. granted in part, 6 FCC Rcd 3448 (1991), modified in part, 7 FCC Rcd 6564 (1992) (collectively "Broadcast Licensing Character Qualifications").

⁷⁵ See, e.g., *Broadcast Licensing Character Qualifications*, 7 FCC Rcd at 6567, ¶ 16. As a general matter, non-FCC misconduct by parent or related subsidiary is reportable if (a) there is a close ongoing relationship between the parent (or related subsidiary) and the licensee; (b) the two have common principals; and (c) the common principals are actively involved in the operations of the licensee. *Id.* Misconduct directly involving common principals is reportable where the common principal of the licensee or applicant was in control of the other entity or was adjudicated to be directly involved in the other entity's misconduct. *Id.* n.51.

⁷⁶ See *Broadcast Licensing Character Qualifications*, 7 FCC Rcd at 6567; see also *MCI Telecommunications Corp.*, 3 FCC Rcd 509, 515 n 14 (1988).

⁷⁷ See *Character Policy Statement 1986*, 102 F.C.C.2d at 1205.

⁷⁸ *Id.*

⁷⁹ See EchoStar Petition at 56-57

⁸⁰ See EchoStar Petition at 51, 56-57 (citing *Continental Satellite Corporation*, 4 FCC Rcd 6292, 6299 (1989) ("Continental Order"), *RKO General, Inc.*, 3 FCC Rcd 5057, 5058 (1988) ("RKO Order"), appeal dismissed sub nom. *Los Angeles Television v. FCC*, No 88-1693 (D.C. Cir. Aug. 4, 1989)).

⁸¹ See *Continental Order*, 4 FCC Rcd at 6298 (citing *Central Telecommunications, Inc. v TCI Cablevision*, 610 F Supp 891 (W.D. Mo. 1985), *aff'd*, 800 F.2d 711 (8th Cir. 1986), *cert denied* 480 U.S. 910 (1987); and *RKO Order*, 3 FCC Rcd 5057, 5058).

28. In the *DISCO II Order*, the Commission implemented a number of measures to foster competition among multiple satellite service providers, including adoption of a rebuttable presumption that entry by WTO Member satellite systems will promote competition in the United States.⁹⁰ The Commission, however, explicitly did not apply this open entry presumption to satellites providing DBS, Direct-to-Home ("DTH"), and Digital Audio Radio Services ("DARS"), as these services were not covered by commitments made as part of the WTO Basic Telecom Agreement (i.e., "non-WTO covered services").⁹¹ The Commission determined that for all requests to provide non-WTO covered services to the United States using non-U.S. licensed satellites, an evaluation was required to determine whether effective competitive opportunities ("ECO") for U.S. satellite systems were available in the country in which the foreign satellite was licensed ("ECO-Sat test").⁹²

29. *Position of Parties.* EchoStar contends that the Commission should determine if Australia provides effective competitive opportunities to U.S. companies to provide the same service News Corp. would be authorized to provide in the United States.⁹³ EchoStar maintains that the underlying rationale for applying the *DISCO II* ECO-Sat test to the provision of non-WTO covered services, i.e., "to encourage open markets for these services and to avoid anti-competitive conduct in the U.S. market," holds whether the foreign company is attempting to gain entry to the U.S. market through a foreign licensed satellite or through acquisition.⁹⁴ Accordingly, EchoStar argues the Commission should apply the ECO-Sat test in this case.⁹⁵

30. The Applicants respond that the ECO-Sat test is wholly irrelevant to this proceeding. They assert that the ECO-Sat test applies only to parties "requesting authority to operate with a non-U.S. licensed space station to serve the United States."⁹⁶ Thus, by its terms, Applicants claim the ECO-Sat test does not apply to foreign investments in U.S. licensed DBS providers. They submit that this position is confirmed in the recent *SES-DTH Order*.⁹⁷ Further, the Applicants contend that application of the

⁹⁰ See *DISCO II Order*, 12 FCC Rcd at 24098. Opposing parties have the burden to rebut the presumption by showing that granting the application would cause competitive harm in the U.S. satellite market. *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ See EchoStar Petition at 46-50. EchoStar submits Australia is one of News Corp.'s home markets because it is incorporated in Australia and is a 25% owner of FOXTEL, Australia's leading subscription television provider. *Id.* at 47.

⁹⁴ *Id.* at 47, quoting *DISCO II Order*, 12 FCC Rcd at 24137, ¶ 98.

⁹⁵ *Id.* EchoStar argues that News Corp. would fail both the *de jure* and *de facto* components of the ECO-Sat test with respect to Australia. EchoStar claims *de jure* barriers exist due to statutory limits on U.S. investments for subscription television broadcasting licenses and programming expenditure requirements. EchoStar claims *de facto* barriers exist due to a content-sharing agreement between an Australian News Corp. affiliate and a major Australian subscription television company. *Id.* at 47-50.

⁹⁶ Applicants' Reply at 68 (citing 47 C.F.R. § 25.137(a); and *DISCO II*, 12 FCC Rcd at 24136). See also Letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP to Marlene H. Dortch, Secretary, FCC (Sept. 5, 2003) ("Applicants' Sept 5, 2003 Ex Parte") at 1-2.

⁹⁷ See *SES AMERICOM, Inc. Applications for Modification of Fixed-Satellite Service Space Station Licenses and Columbia Communications Corp.*, 18 FCC Rcd 18598 (IB 2003) ("*SES-DTH Order*"); see also Applicants' Sept 5, 2003 Ex Parte at 1-2.

already required by Section 310(a) and (b) of the Act,¹⁰⁶ in deciding questions of access to the U.S. market for provision of DBS service through use of non-U.S. licensed satellites, the Commission concluded that it would apply the requirements set forth in the *DISCO II Order*.¹⁰⁷ As stated earlier, the *DISCO II Order* requires that the Commission apply the ECO-Sat test to all requests to access the U.S. market for the provision of non-WTO covered services (*i.e.*, DTH, DBS and DARS) using non-U.S. licensed satellites.¹⁰⁸ Thus, we note that if News Corp. were seeking to operate a foreign-licensed satellite to provide DBS service in the United States, we would not permit it to do so until we conducted an ECO-Sat analysis.¹⁰⁹ The proposed transaction, however, does not involve a request to use non-U.S. licensed satellites but rather a request to acquire U.S. licensed satellites to deliver DBS service to the U.S. market. As such, the instant transaction does not fall within the analytic framework adopted by the Commission in the *DISCO II Order* and, thus, application of the ECO-Sat test is not required in this case.¹¹⁰

33. Regardless of the applicability of Section 310(a) and (b) of the Act or the ECO-Sat test, the Commission maintains a responsibility pursuant to Section 310(d) to examine and make a finding as to whether a specific transfer or assignment involving Title III licenses will serve the public interest, convenience, and necessity.¹¹¹ Thus, consistent with our responsibilities under Section 310(d), where appropriate, our review considers whether public interest harms are likely to result from foreign investment in Title III licensees.¹¹² Therefore, in this case, we consider whether foreign investment in a U.S. licensee is likely to distort competition in any relevant U.S. market. We also consider whether such foreign investment will further competition in the U.S. market and whether efficiencies and other public interest benefits are likely to result. If we find any harms resulting from foreign investment, these harms will be taken into consideration in the overall balancing of the potential public interest harms and benefits of the proposed transaction.¹¹³

¹⁰⁶ 2002 DBS Report and Order, 17 FCC Rcd at 11346-48.

¹⁰⁷ See 2002 DBS Report and Order, 17 FCC Rcd at 11349.

¹⁰⁸ See *DISCO II Order*, 12 FCC Rcd at 24135.

¹⁰⁹ See *DISCO II Order*, 12 FCC Rcd at 24136. See also *Digital Broadband Applications Corp., Consolidated Application for Authority to Operate U.S. Earth Stations with a U.S.- Licensed Ku-Band FSS Satellite and Canadian-Licensed Nimiq and Nimiq 2 Satellites to Offer Integrated Two-Way Broadband Video and Data Service Throughout the United States*, 18 FCC Rcd 9455 (2003) (“*DBAC Order*”).

¹¹⁰ In addition, we note that the Commission has concluded that there is no public policy justification for imposing foreign ownership restrictions on DBS providers that are not subject to such restrictions under Section 310(b) of the Act. See 2002 DBS Report and Order, 17 FCC Rcd at 11348. Licensees using FSS satellites to provide subscription DTH service, an almost identical service to DBS, are not subject to foreign ownership restrictions. In addition, because cable operators also are not subject to foreign ownership restrictions, eliminating additional foreign ownership-licensing restrictions not otherwise required under the Act, allows DBS to compete on a more equal regulatory basis with cable operators. *Id.*

¹¹¹ 47 U.S.C. § 310(d).

¹¹² See, *e.g.*, *Orbcomm Order*, 17 FCC Rcd 4507 ¶ 18; *SES-DTH Order*, ¶ 10.

¹¹³ See Section IX, *infra*

national security, law enforcement, foreign policy or trade policy concerns, we accord deference to its expertise on such matters.¹¹⁹ On November 25, 2003, the DOJ, and the Federal Bureau of Investigation ("FBI"), with the concurrence of the Department of Homeland Security ("DHS") (collectively referred to as the "Executive Agencies"), filed a "Petition to Adopt Conditions to Authorizations and Licenses" ("Petition to Adopt Conditions"),¹²⁰ along with attachments in this proceeding.¹²¹

36. Specifically, in the Petition to Adopt Conditions, the Executive Agencies state that their ability to satisfy their obligations to protect the national security, to enforce the laws, and to preserve the safety of the public could be significantly impaired by transactions in which foreign entities will own or operate a part of the U.S. communications system, or in which foreign-located facilities will be used to provide domestic communications services to U.S. customers.¹²² The Executive Agencies note, that News Corp., the foreign entity acquiring control of Hughes (through its controlling interest in FEG), is organized under the laws of Australia.¹²³

37. According to the Executive Agencies, after discussions with the Applicants, the Executive Agencies concluded that the commitments set forth in the Hughes By-law Amendment, the Proposed Resolutions, and the Letter Agreement were adequate to ensure that the Executive Agencies and other entities with responsibility for enforcing the law, protecting the national security and preserving public safety can proceed in a legal, secure and confidential manner to satisfy these responsibilities.¹²⁴ Accordingly, DOJ and FBI, with the concurrence of DHS, advised the Commission that they have no objections to the grant of the Applicants' transfer of control applications, provided that the Commission condition the grant of the transfer of control applications on (i) GM causing Hughes to adopt, and Hughes adopting, prior to the closing of the subject transaction, the Hughes By-law Amendment; (ii) the adoption by the Board of Directors of News Corp. of the Proposed Resolutions; and (iii) compliance by Hughes and News Corp., respectively, with the commitments set forth in the Hughes By-laws Amendment, the Proposed Resolutions, and the Letter Agreement.¹²⁵

(Continued from previous page)

(2001); *TMI Communications and Company, L P and SatCom Systems Inc.*, File No. 647-DSE-P/L-98 et al, 14 FCC Rcd 20798 at 20824 ¶ 57 (1999).

¹¹⁹ See *Foreign Participation Order*, 12 FCC Rcd at 23918-21.

¹²⁰ See *Petition to Adopt Conditions to Authorizations and Licenses*, MB Docket No. 03-124 (filed Nov. 25, 2003).

¹²¹ The attachments include Exhibit 1, Hughes Electronics Corporation, Amended and Restated By-laws ("Hughes By-law Amendment"); Exhibit 2, Proposed Resolution of the Board of Directors of The News Corporation Limited ("Proposed Resolutions"); and Exhibit 3, Letter Agreement, dated November 3, 2003, reached between Hughes and the Executive Agencies ("Letter Agreement"). See *Petition to Adopt Conditions* at 2. These exhibits are set forth in Appendix E of this Order and Authorization.

¹²² See *Petition to Adopt Conditions* at 4

¹²³ The Executive Agencies also note that K. Rupert Murdoch, a United States citizen, directly and indirectly controls approximately a 16% equity/30% voting interest in News Corp. and that apart from Liberty Media Corporation, a Delaware corporation which according to the Applicants holds a purely passive interest in News Corp., there is no other shareholder with a greater than 10% interest in News Corp. *Id.* at 4-5.

¹²⁴ Appendix E to this Order and Authorization attaches the three exhibits as Exhibit 1 (Hughes By-laws Amendment); Exhibit 2 (Proposed Resolutions); and Exhibit 3 (Letter Agreement).

¹²⁵ See *Petition to Adopt Conditions* at 5-6. See also Appendix E.

interest in the second largest MVPD will increase the incentive and ability of News Corp. to seek and obtain supra-competitive prices for its video programming services through retransmission consent negotiations for its local broadcast television station signals and in affiliate agreement negotiations for its regional sports cable networks. This, they contend, will increase rival MVPD costs, who will in turn seek to recover these increased costs through end-user rate increases, a result not foreclosed by either the program access or retransmission consent rules, or the Applicants' offered additional commitments.¹³² Before assessing these claims, we first provide some background on relevant Commission rules concerning the distribution of video programming, including our program access rules, program carriage rules, and the must-carry/retransmission consent requirements, and on economic theory concerning horizontal and vertical transactions. We then define the relevant upstream and downstream markets and consider whether the transaction is likely to have adverse competitive effects in those markets.

B. Applicable Regulatory Framework

1. Program Access Requirements

41. The program access provisions, contained in Section 628 of the Communications Act, were adopted as part of the Cable Television Consumer Protection and Competition Act of 1992.¹³³ At the time, Congress was concerned that most cable operators enjoyed a monopoly in program distribution at the local level.¹³⁴ Congress found that vertically integrated program suppliers had the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies.¹³⁵ Section 628 is intended to foster the development of competition to traditional cable systems by governing the access of competing MVPDs to cable programming services. DBS was among the technologies that Congress intended to foster through the program access provisions.¹³⁶ As a general matter, the program access rules prohibit a cable operator, a satellite cable programming vendor¹³⁷ in which a cable operator has an attributable interest, or a satellite broadcast programming vendor from engaging in "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any MVPD from providing satellite cable programming or satellite broadcast programming to subscribers of consumers."¹³⁸ Thus, Congress in 1992 acknowledged that access to satellite cable programming was

¹³² See, e.g., ACA Comments at 7-23; Cablevision Comments at 8-30; CDD Comments; CFA Reply Comments at 3-12, Consumers Union Sept. 23, 2003 Ex Parte; EchoStar Petition at 11-39, 58-67; JCC Comments at 13-65; NAB Comments at 5-9, 15-26; NRTC Petition at 7-15; RCN Comments at 4-11; Pegasus Comments.

¹³³ Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act").

¹³⁴ H.R. Conf. Rep. No. 102-862, at 93 (1992).

¹³⁵ 1992 Cable Act § 2(a)(5).

¹³⁶ H.R. Rep. No. 102-628, at 165-66 (1992) (additional views of Messrs. Tauzin, Harris, Cooper, Synar, Eckart, Bruce, Slattery, Boucher, Hall, Holloway, Upton and Hastert).

¹³⁷ "Satellite cable programming" is video programming which is transmitted via satellite to cable operators for retransmission to cable subscribers. 47 C.F.R. § 76.1000(h). A "satellite cable programming vendor" is an entity engaged in the production, creation or wholesale distribution for sale of satellite cable programming. 47 C.F.R. § 76.1000(i).

¹³⁸ Communications Act § 628(b); 47 U.S.C. § 548(b)

cable programming continues to be necessary in order for competitive MVPDs to remain viable in the marketplace.¹⁴⁷ The Commission further found that an MVPD's ability to provide service that is competitive with an incumbent cable operator is significantly harmed if denied access to "must have" vertically integrated programming for which there are no good substitutes, such as regional news and sports networks.¹⁴⁸ The Commission also found that vertically integrated programmers retain the incentive to favor their affiliated cable operators over competing MVPDs.¹⁴⁹ In that regard, the Commission found that cable operators continue to dominate the MVPD marketplace and that horizontal consolidation and clustering combined with affiliation with regional programming, have contributed to cable's overall market dominance.¹⁵⁰ In addition, the Commission determined that an economic basis for denial of access to vertically integrated programming to competitive MVPDs continues, and that such denial would harm such competitors' ability to compete for subscribers.¹⁵¹ The prohibition on exclusive contracts for satellite-delivered cable or satellite-delivered broadcast programming was therefore extended for five years, until October 5, 2007.¹⁵²

2. Program Carriage Rules

45. Our rules implementing section 616 of the 1992 Cable Act¹⁵³ prohibit all MVPDs from: (1) demanding a financial interest in any program service as a condition of carriage of the service on its system; (2) coercing any video programming vendor to provide exclusive rights as a condition of carriage; and (3) unreasonably restraining the ability a video programming vendor to compete fairly by discriminating on the basis of affiliation or non-affiliation of vendors in the selection, terms or conditions of carriage.¹⁵⁴ The program carriage rules also specify complaint procedures and remedies for violations of these requirements. Complaints may be brought by aggrieved video programmers or MVPDs.¹⁵⁵

¹⁴⁷ *Id.* at 12138 ¶ 32.

¹⁴⁸ *Id.* at 12125 ¶ 4.

¹⁴⁹ *Id.* at 12143 ¶ 45.

¹⁵⁰ *Id.* at 12125 ¶ 4.

¹⁵¹ *Id.*

¹⁵² *Id.* at 12124 ¶ 1.

¹⁵³ See 47 U.S.C. § 536(a). Congress enacted section 616 based on findings that some cable operators had required certain non-affiliated program vendors to grant exclusive rights to programming, a financial interest in the programming, or some other additional consideration as a condition of carriage on the cable system. *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 2642 ¶ 1 (1993).

¹⁵⁴ See 47 C.F.R. § 76.1301, see also *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 2642 (1993).

¹⁵⁵ Section 76.1302 authorizes video programming vendors and MVPDs to file program carriage complaints with the Commission. 47 C.F.R. § 76.1302; see also *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 2642 ¶ 1 (1993). On reconsideration, the Commission amended 47 C.F.R. § 76.1302 to specifically afford standing to MVPDs aggrieved by carriage agreements between other MVPDs and programming vendors that violate section 616 of the 1992 Cable Act or the (continued....)

requirements are effective "until January 1 2006."¹⁶⁵

48. By the time Congress enacted the must-carry/retransmission consent provisions of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), Congress had recognized the importance of local television broadcast signals not only as providers of a valuable public service, but as "must-have programming" critical to a DBS offering. By permitting DBS operators to carry local television broadcast signals, Congress sought to place DBS operators on a level playing field with their cable counterparts so that they could compete more effectively with cable operators.¹⁶⁶ To ensure that broadcasters negotiated fairly with these relatively new entrants into the MVPD market, Congress enacted the good faith negotiation requirement and prohibition exclusive retransmission consent agreements. Congress explicitly stated that good faith negotiation did not equate to a requirement that broadcasters grant retransmission consent on the same terms and conditions to all MVPDs.¹⁶⁷

C. Relevant Markets

49. DirecTV is one of two full-CONUS DBS providers and the second largest MVPD in the U.S, providing service in all 50 states.¹⁶⁸ It offers more than 825 channels of sports, news, movies, and family programming, including local broadcast channels in 64 television markets, high definition and foreign-language programming to nearly 12 million customers.¹⁶⁹ News Corp. is a global media corporation owning a wide variety of video programming products from cable and broadcast networks to broadcast television stations which they sell to MVPDs across the country. Included in its suite of video programming products are the Fox broadcast network, one of the four major national broadcast networks, 35 owned and operated (O&O) full-power local television broadcast stations, including two stations in three of the top five and five of the top ten markets, 10 nationally distributed cable networks, 12 owned and managed regional cable networks,¹⁷⁰ and 171 independently owned local television stations that are

¹⁶⁵ See 47 U.S.C. § 325(b)(3)(C). See also, 47 C.F.R. § 76.65(f)(good faith negotiation requirement sunsets at midnight on Dec. 31, 2005)

¹⁶⁶ See H.R. Rep. No. 106-79 at 11-15 (1999), Satellite Home Viewer Improvement Act, Pub. L. No. 106-113, 113 Stat. 1501, at App. I at 1501A-523 & 544

¹⁶⁷ 47 U.S.C. §325(b)(3)(C)(ii) (stating that "it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations")

¹⁶⁸ As of the end of the third quarter, DirecTV had 11.85 million subscribers. See *Hughes Announces Third Quarter Growth of 17% in Revenues and 33% in Operating Profit Before D&A, Operating Profit Quadruples; DirecTV Adds 326,000 Owned and Operated Subscribers in the Quarter, a 58% Increase Over Last Year*, Oct. 14, 2003, available at: http://www.hughes.com/ir/releases/2003_results/q3_2003/default.asp (viewed Nov. 14, 2003). DirecTV has surpassed the total subscribers of Time Warner Cable, Inc., which had 11.4 million subscribers as of September 30, 2003. See *Time Warner Inc Consolidated Balance Sheet*, available at: http://www.timewarner.com/investors/quarterly_earnings/2003_3q/pdf/3q2003charts.pdf (viewed Nov. 14, 2003). Thus, DirecTV is now second only to Comcast in terms of subscribership.

¹⁶⁹ Hughes Electronics Corporation, *General Overview* at <http://www.hughes.com/ir/general/default.asp> (visited Nov. 5, 2003).

¹⁷⁰ Since filing the application for transfer of control, News Corp. has launched an additional network, Fuel, which brings the number of nationally distributed channels to 11

although the Commission has considered at times that a more narrowly drawn market may be appropriate, it has continued to use the MPVD product market for its competition analysis in recent cases. Accordingly, Applicants propose that the MVPD market is the relevant product market for purposes of analyzing the issues presented by this transaction.¹⁷⁹ Intelsat agrees, asserting that the Commission and antitrust authorities have traditionally defined markets in a technology-neutral manner,¹⁸⁰ and urging the Commission to recognize the interchangeability of space and terrestrial transmission facilities when defining the appropriate product market in its analysis of the Application.¹⁸¹ NRTC, on the other hand, contends that the decision of whether to consider cable systems with low channel capacities in the same product market as DBS should be determined by an administrative law judge at hearing.¹⁸² CFA asserts that DBS and cable occupy "somewhat different product spaces" due to the lack of local channels on DBS in many markets, the unavailability of DBS in urban areas because of line of sight problems, and cost.¹⁸³ CFA asserts that this is best evidenced by the fact that competition from DBS has not constrained cable prices.¹⁸⁴ CFA does not urge the Commission to define the product market differently, but seeks to emphasize the lack of constraint on cable prices as part of its broader claim that the transaction will raise prices of DBS and cable.¹⁸⁵

53. *Discussion.* In the *EchoStar-DirecTV HDO*, the Commission determined that the relevant product market that includes services offered by DBS providers was no broader than the entire MVPD market, but may well be narrower.¹⁸⁶ For the purpose of analyzing the competitive effects of the transaction before us we may again safely presume that the relevant downstream product market is no broader than the MVPD market. As we have noted, and our analysis below demonstrates, by purchasing Hughes and its DirecTV unit, News Corp. becomes a vertically integrated competitor to all of its MVPD programming purchasers in every MVPD market. To the degree that the transaction increases News Corp.'s incentive and ability to act anticompetitively, it does so with respect to all of its MVPD customer/competitors.

¹⁷⁹ Application at 44-45.

¹⁸⁰ Intelsat Comments at 2-5.

¹⁸¹ Intelsat Comments at 6

¹⁸² NRTC Petition at 2. NRTC states that we should consider whether the "relevant geographic market" should be divided into three categories—markets not served by any cable system; markets served by low capacity cable systems; and markets served by high-capacity cable systems. *Id.* NRTC states that this determination also should factor in the number of households and subscribers in each market. *Id.* Although NRTC characterizes its concern as a definition of the relevant geographic market, it actually proposes that we consider whether to vary our analysis according to the types of products available in different markets, which concerns product markets, rather than geographic markets.

¹⁸³ CFA Reply Comments at 6-8. CFA asserts that DBS is more expensive than cable, and that customers often subscribe in order to receive high-end services not provided (until the recent advent of digital cable) on cable systems, such as high-end sports packages, out of region programming, and foreign language channels. *Id.*

¹⁸⁴ CFA Reply Comments at 7-8.

¹⁸⁵ CFA Reply Comments at 2, 4-5, Attachment at 2

¹⁸⁶ *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20609 ¶ 115. The United States Department of Justice ("DOJ") identified this same MVPD product market in its complaint against the proposed merger of EchoStar and DIRECTV. *DOJ/EchoStar Complaint* ¶ 24.

carry/retransmission consent election timeframe.¹⁹⁵ The broadcast stations most likely to elect must carry are those that are not affiliated with one of the four major networks and those in smaller markets.¹⁹⁶ Those stations that elect retransmission consent negotiate the terms of carriage with MVPDs. Owners of local television broadcast stations that elect retransmission consent are generally compensated by one or more of the following: (1) retransmission consent fees; (2) cable advertising availabilities; and/or (3) where the station owner also owns cable programming networks, it may grant retransmission consent rights in exchange for carriage of its cable programming networks by the MVPD.¹⁹⁷ At least one study finds that historically, most broadcasters have opted for (or settled for) in-kind compensation from cable operators in exchange for retransmission consent—the right to program a channel on the cable system or some cable advertising availabilities.¹⁹⁸ Because they are generally retransmitted in their entirety, broadcast television station signals already contain advertising sold by the station owner, the network with which the station is affiliated (if any), or other program suppliers.¹⁹⁹

57. Some cable programming networks offer programming of broad interest and depend on a large, nationwide audience for profitability, others also seek large nationwide audiences but offer content that is more focused in subject; yet others still seek nationwide distribution, but offer narrowly tailored programming, focusing on a “niche within a niche.”²⁰⁰ Some cable programming networks do not seek a national audience but are regional or even local in scope, including RSNs and local or regional news networks. Some cable programming networks likely can survive with distribution to a few million subscribers within a certain region, while others may need nationwide distribution in order to remain viable.²⁰¹

58. *Positions of the Parties.* Applicants describe the video programming market as national or international in geographic scope, although they do not offer a product market definition.²⁰² EchoStar

¹⁹⁵ Broadcasters must elect either must-carry or retransmission consent every three years (except for the very first DBS carriage election cycle, which commenced in 2001 and ends on Dec. 31, 2005). See 47 C.F.R. §§ 76.64(f), 76.66(c). The most recent cable carriage election was made on Oct. 1, 2002, became effective on Jan. 1, 2003, and the election cycle will end on Dec. 31, 2005. 47 C.F.R. § 76.64(f).

¹⁹⁶ *Carriage of the Transmissions of Digital Television Broadcast Stations*, 13 FCC Rcd 15092 at 15110 (1998) (“DTV Must-Carry Notice”). As we explain above, electing must-carry entitles a station to carriage but not compensation. See Section V.B.3., *supra*.

¹⁹⁷ FCC, OPP Working Paper #37, *Broadcast Television: Survivor in a Sea of Competition* at 29.

¹⁹⁸ FCC, OPP Working Paper #37, *Broadcast Television: Survivor in a Sea of Competition* at 29.

¹⁹⁹ FCC, OPP Working Paper #37, *Broadcast Television: Survivor in a Sea of Competition* at 11 (broadcast networks, broadcast stations, and syndicators sell time to national advertisers; broadcast stations also sell time to local advertisers)

²⁰⁰ *EchoStar-DirectTV HDO*, 17 FCC Rcd 20654 ¶ 250 (citing *Ownership Further Notice*, 16 FCC Rcd at 17322-23. Examples of the first type of programming include TNT and USA; examples of the second type include ESPN for sports and CNN for news, and examples of this third type of programming include Discovery Health, the Golf Network, and Home and Garden. *Id.*

²⁰¹ *EchoStar-DirectTV HDO*, 17 FCC Rcd 20654 ¶ 250 (citing *Ownership Further Notice*, 16 FCC Rcd at 17323); *Comcast-AT&T Order*, 17 FCC Rcd at 23258 ¶ 35

²⁰² Application at 45

61. *Other Relevant Product Markets.* News Corp. also owns substantial interests in firms selling programming-related technologies. As with the video programming products, there is no need to engage in a rigorous market definition in order to analyze the potential anticompetitive effects of the transaction. Rather, we will separate these products into three programming-related technologies product categories: (1) electronic and interactive program guides; (2) interactive television programming and associated technologies; and (3) conditional access technologies. We address issues arising from News Corp.'s acquisition of an interest in PanAmSat in Section VI.C.4.e., *infra*

2. Relevant Geographic Markets

a. MVPD Services

62. Applicants assert that the Commission has consistently found that the geographic scope of the multichannel video programming distribution market is local or regional.²¹¹ Cablevision and EchoStar assert that the proper geographic market is local.²¹² In the past, we have concluded that the relevant geographic market for MVPD services is local²¹³ because consumers make decisions based on the MVPD choices available to them at their residences and are unlikely to change residences to avoid a small but significant increase in the price of MVPD service. In order to simplify the analysis, we have aggregated consumers that face the same choice in MVPD products into a larger, more manageable relevant geographic market. We find it appropriate to continue this approach here. Because the major MVPD competitors in many cases are the local cable company and the two DBS providers, we find that the franchise area of the local cable company can be used as the relevant geographic market for purposes of this analysis.

b. Video Programming

63. Applicants assert that the geographic scope of the video programming market is national and possibly international. The Applicants do not divide the video programming market into different types of video programming, and therefore do not provide geographic definitions for different types of programming. EchoStar critiques Applicants' failure to identify or analyze various segments of the video programming market.²¹⁴ Although they do not provide detailed descriptions of how the geographic markets for each programming segment should be defined for purposes of our analysis, MVPD commenters identify at least two segments of the video programming market that have a geographic scope narrower than the "national or international" scope of the programming market described by Applicants. MVPDs contend that access to one or both of these segments is critical to their ability to compete within the geographic areas where such programming is popular: broadcast network programming delivered by free over-the-air television stations (within a Nielsen Designated Market Area

(Continued from previous page)

²¹⁰ The broadcast television programming category includes the 35 O&Os and the 171 Fox affiliates. *See supra* n 171.

²¹¹ Application at 44 (citing 2002 Video Competition Report, 17 FCC Rcd at 26852-55; Comcast-AT&T Order, 17 FCC Rcd at 23282, MCIT, 16 FCC Rcd at 21613-14)

²¹² Cablevision Comments at 12, n.22; EchoStar Petition at 12.

²¹³ EchoStar-DirectTV HDO, 17 FCC Rcd 20610 ¶ 119, Comcast-AT&T Order, 17 FCC Rcd at 23282 ¶ 90.

²¹⁴ EchoStar Petition at 31.

components which have high value and low transportation costs and can be easily delivered and are delivered to many widespread locations in the U.S. and the world.

VI. ANALYSIS OF POTENTIAL HARMS IN THE RELEVANT MARKETS

A. Introduction

68. In this section, we consider the potential harms of the proposed transaction in the relevant product markets that include video programming and MVPD services. In particular, we consider whether, as a result of the transaction, the post-transaction entity will have an increased incentive and ability to engage in anticompetitive foreclosure strategies with respect to national and non-sports regional cable programming networks, regional sports cable programming networks, broadcast television station signals, programming-related technologies, including electronic and interactive programming guides and fixed satellite services. Where we find that the proposed transaction is likely to result in anticompetitive harms, we also analyze and explain our decision to impose conditions that are narrowly targeted to address those harms.

69. Transactions involving the acquisition of a full or partial interest in another company may give rise to concerns regarding "horizontal" concentration and/or "vertical" integration, depending on the lines of business engaged in by the two firms. A transaction is said to be horizontal when the firms in the transaction sell products that are in the same relevant markets and are therefore viewed as reasonable substitutes by purchasers of the products. Horizontal transactions are of antitrust concern because they eliminate competition between the firms and increase concentration in the relevant markets.²²⁰ The reduction in overall competition in the relevant markets may lead to substantial increases in prices paid by purchasers of products in the markets.

70. Vertical transactions raise slightly different competitive concerns. At the outset, it is important to note that antitrust law and economic analysis have viewed vertical transactions more favorably in part because vertical mergers, standing alone, do not increase concentration in either the upstream or downstream markets.²²¹ In addition, vertical mergers may generate significant efficiencies. For example, a vertical transaction may produce a more efficient organization form, which can reduce transaction costs, limit free-riding by internalizing incentives, and take advantage of technological economies.²²² Where both the upstream and downstream firms possess enough market power to set prices above marginal costs, a vertical transaction also may reduce prices through the elimination of this "double marginalization." The reduction occurs because the integrated firm, in determining the costs of producing the downstream product and consequently the final price charged to consumers, will consider

²²⁰ 4 AREEDA & HOVENKAMP 5-6; see also 1 ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 317 (4th ed. 1997) (hereinafter ANTITRUST LAW DEVELOPMENTS); KIP VISCUSI, JOHN M. VERNON & JOSEPH E. HARRINGTON, JR., ECONOMICS OF REGULATION AND ANTITRUST 192 (3d ed. 2000) ("VISCUSI ET AL.").

²²¹ In the simple case where there are two levels of production, an upstream market is a market for inputs, while a downstream market is a market for end-user outputs. We will sometimes refer to the upstream and downstream markets as the input and output markets.

²²² VISCUSI ET AL. at 219-221; Michael H. Riordan and Steven Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L. J. 513, 523-26 (1995) ("Riordan & Salop").

the real economic cost of the input rather than the higher price (including the upstream profit margin) previously charged by the unintegrated upstream firm.²²³

71. Nevertheless, as discussed in greater detail below, vertical transactions also have the potential for anticompetitive effects. In particular, a vertically integrated firm that competes both in an upstream input market and a downstream output market, such as post-transaction News Corp., may have the incentive and ability to: (1) discriminate against particular rivals in either the upstream or downstream markets (*e.g.*, by foreclosing rivals from inputs or customers); or (2) raise the costs to rivals generally in either of the markets. We first address potential horizontal harms and then analyze, with respect to each affected product and geographic market, potential vertical harms arising from the proposed transaction.

B. Potential Horizontal Harms

72. *Positions of the Parties.* Applicants explain that the satellite assets of Hughes and its subsidiaries in the United States complement the non-U.S. satellite interests of News Corp., completing News Corp.'s global network for the distribution of programming without creating any domestic overlap of satellite assets or MVPD participation.²²⁴ In contrast with the failed EchoStar-DirecTV merger, this transaction, Applicants aver, does not involve the affiliation of two domestic MVPD systems.²²⁵ Similarly, they allege that there is no effect on potential competition because News Corp. has no plans for independently entering the domestic distribution market.²²⁶ Following the transaction, DirecTV will continue to face competition from cable operators in most local markets, as well as continued competition from EchoStar in every local market.²²⁷

73. Nor does the proposed transaction create horizontal overlap in programming, according to the Applicants, because DirecTV does not produce or own any programming (beyond Hughes' 5% passive equity interest in the Hallmark Channel), and has no plans to expand its programming interests.²²⁸ For its part, News Corp. will continue to face competition in regional, national, and international

²²³ Double marginalization occurs when an upstream firm sells an input to a downstream firm at a price that exceeds marginal cost, and the downstream firm then sells its product in the downstream market at a price that exceeds its marginal cost. The margin charged by the upstream firm increases the marginal cost of the downstream firm, which results in a higher end-user price than would occur if the input had been priced at marginal cost. Vertical integration in theory reduces the problem of double marginalization because the integrated firm, in determining the uniform price at which it will sell the downstream product, will consider the real economic cost of producing the input. Because vertical integration effectively reduces the marginal cost of the input, it is likely to result in the integrated firm's setting a lower price for the downstream product, which will benefit consumers. The extent of this benefit, however, will depend crucially on the elasticity of demand for the downstream product. The less elastic is the demand, the greater is the benefit. JEAN TIROLE, *THE THEORY OF INDUSTRIAL ORGANIZATION* (MIT Press 1988) at 174-75; Riordan & Salop, 63 ANTITRUST L. J. at 526-27

²²⁴ Application at 45.

²²⁵ Application at 45.

²²⁶ Application at 46.

²²⁷ Application at 46.

²²⁸ Application at 46.

("DMA")); and RSN programming (within the region where the sporting events featured on the RSN take place).²¹⁵

64. Because video programming is a non-rival good²¹⁶ that can be distributed large distances at relatively little cost, the relevant geographic market potentially could be the national or international in scope. As a practical matter, however, demand for particular types of programming varies from region to region. Moreover, owners of programming have the right to decide in which areas to license the programming for distribution, and they generally limit distribution to smaller areas where the demand for programming is greatest. Given this, we find it reasonable to approximate the relevant geographic market for video programming by looking to the area in which the program owner is licensing the programming.

65. Applying this approach, we conclude that in the case of broadcast television programming, it is reasonable to use DMAs to define the relevant geographic market for each individual broadcast station. Contracts between broadcast stations and the providers of programming, as well as FCC regulations and broadcasting technology, limit the extent to which broadcast station signals can be distributed outside of the assigned market area.²¹⁷ DMAs are widely used to represent these areas, so we will use them as reasonable approximations.

66. With respect to national cable programming networks the relevant geographic market is at least national in scope. These networks are generally licensed to MVPDs nationwide, and in some cases they are licensed internationally. The widespread demand that is evidenced for such programming and the corresponding widespread distribution suggests that the relevant geographic market is at least national in scope. In contrast, with respect to RSNs, we conclude, as we did in the Comcast-AT&T merger, that the relevant geographic market for RSNs is regional.²¹⁸ In general, contracts between sports teams and RSNs limit the distribution of the content to a specific "distribution footprint," usually the area in which there is significant demand for the specific teams whose games are being transmitted.²¹⁹ MVPD subscribers outside the footprint thus are unable to view many of the sporting events that are among the most popular programming offered by RSNs. We thus find it reasonable to define the relevant geographic market as the "distribution footprint" established by the owner of the programming.

67. Finally, we find that the geographic market for programming-related technologies is at least national in scope, and possibly international. These technologies are composed of software and hardware

²¹⁵ See, e.g., JCC at 41-43 (discussing the effects of temporary withholding of RSN programming from cable operators on the relevant system and competitors serving the same region), EchoStar at 15 (discussing the effects on EchoStar's penetration rates in DMAs where it lacked access to the signals of all four major network affiliated stations)

²¹⁶ A good is said to be "non-rival" if one individual's consumption of the good does not diminish the supply of the good to other individuals. See THE MIT DICTIONARY OF MODERN ECONOMICS 308 (David W. Pearce, ed., 4th ed. 1999).

²¹⁷ Broadcasters have the right to prevent cable operators from carrying certain programming from the signals of broadcast stations from other markets. See 47 C.F.R. §§76.92-76.95 (network non-duplication rule); 47 C.F.R. §§76.101-76.110 (syndicated exclusivity rule)

²¹⁸ Comcast-AT&T Order, 17 FCC Rcd at 23267 ¶ 59.

²¹⁹ DirecTV, Blackout Information at http://www.directvsports.com/Blackout_Info/ (visited Oct. 3, 2003).

complains that Applicants “postulate a single product market encompassing all programming” but offer no economic evidence to support this view.²⁰³ Commenters identify and discuss various segments of the video programming market, including broadcast network programming and RSN programming. Several commenters contend that News Corp. has market power in some or all segments of the video programming market.²⁰⁴

59. *Discussion.* The record in this proceeding makes clear that the video programming networks offered to MVPDs differ significantly in their characteristics, focus and subject matter. Thus, for example, there are over-the-air broadcast stations, national cable networks, including news, entertainment and hobby networks, as well as various regional networks, including, in particular, regional sports networks. The record further makes clear that these various networks are not viewed as perfect substitutes by either MVPDs or their subscribers.²⁰⁵ Accordingly, we find that the market(s) that include video programming networks are classic differentiated product markets.²⁰⁶ As discussed in greater detail below, the record further indicates that at least a certain proportion of MVPD subscribers view certain types of programming as so critical or desirable that they are willing to change MVPD providers in order to gain or retain access to that programming.²⁰⁷

60. Nothing in the record suggests a need for us to define rigorously all the possible relevant product markets for video programming networks; the primary alleged harm involves a unilateral vertical restraint, and there is sufficient data in the record for us to analyze the potential profitability of News Corp.'s engaging in such temporary foreclosure with respect to certain of its video programming products. For purposes of this analysis, we will separate the video programming products offered by News Corp. into three broad categories: (1) national and non-sports regional cable programming networks;²⁰⁸ (2) regional sports cable networks;²⁰⁹ and (3) local broadcast television programming.²¹⁰

²⁰³ EchoStar Petition at 31.

²⁰⁴ See, e.g., EchoStar Petition at 31 (News Corp. has market power in “a number of relevant segments of the programming market, including regional sports and [broadcast] network programming”); CFA at 4-5 (“One of News Corp./Fox’s most important weapons is significant control over regional and national sports programming.”); Cablevision Comments at 12-17 (discussing News Corp.’s market power in the broadcast network programming segment).

²⁰⁵ See, e.g., JCC Comments at 20, 36 (discussing lack of substitutes for Fox broadcast programming and sports programming).

²⁰⁶ Differentiated products are products whose characteristics differ and which are viewed as imperfect substitutes by consumers. See Dennis W. Carlton & Jeffrey M. Perloff, *MODERN INDUSTRIAL ORGANIZATION* 281 (2d ed. 1991).

²⁰⁷ [REDACTED] Technical Appendix Sections A 3 and B.3, [REDACTED].

²⁰⁸ The national and non-sports regional cable programming network category includes 11 nationally distributed networks owned and managed by News Corp. These networks are Fox News Channel, FX, National Geographic Channel, Speed Channel, Fox Movie Channel, Fox Sports World, Fox Sports en Espanol, Fox Sports Digital Networks, TV Guide Channel, TV Games Channel, and Fuel.

²⁰⁹ The regional sports cable networks category includes the 12 RSNs owned and managed by News Corp. These networks are Fox Sports Net Arizona, Fox Sports Net Detroit, Fox Sports Net Midwest, Fox Sports Net North, Fox Sports Net Northwest, Fox Sports Net Pittsburgh, Fox Sports Net Rocky Mountain, Fox Sports Net Southwest, Fox Sports Net West, Fox Sports Net West 2, and the Sunshine Network.

b. Video Programming

54. *Background.* Companies that own cable or broadcast programming networks both produce their own programming and acquire programming produced by others. Companies that own cable networks package and sell this programming as a network or networks to MVPD providers for distribution to consumers.¹⁸⁷ Companies that own broadcast networks distribute their programming through owned or affiliated television broadcast stations. Television broadcast stations affiliated with broadcast networks combine network programming with their own locally originated programming and/or programming secured from other sources to provide over-the-air service.¹⁸⁸ They redistribute such programming via cable or DBS pursuant to an election of mandatory carriage or a retransmission consent agreement.¹⁸⁹ MVPDs combine cable programming networks or broadcast television signals with transport on their cable, satellite, or wireless distribution networks to provide delivered multichannel video services to subscribers.¹⁹⁰

55. Participants in the market for video programming consist of entities of various sizes, from unaffiliated packagers that own one programming network to large corporations with multiple 24-hour networks.¹⁹¹ Cable programming networks sell programming to MVPDs that range in size from small "mom and pop" cable systems offering tens of channels of programming to fewer than a hundred subscribers, to large vertically integrated cable companies offering hundreds of channels of programming to tens of millions of subscribers in dozens of states. Owners of cable programming networks are compensated in part through license fees that are based on the number of subscribers served by the MVPD. These license fees are negotiated based on "rate cards"¹⁹² that specify a top fee, but substantial discounts are negotiated based on the number of MVPD subscribers and on other factors, such as placement of the network on a particular programming tier.¹⁹³ Most cable programming networks and MVPDs also derive revenue by selling advertising time during the programming.¹⁹⁴

56. Commercial local broadcast television stations elect to be carried on MVPDs pursuant to must-carry status or retransmission consent on a schedule that tracks the three-year statutory must-

¹⁸⁷ *Comcast-AT&T Order*, 17 FCC Rcd 23258 ¶ 34

¹⁸⁸ *Review Of The Commission's Regulations Governing Television Broadcasting*, 10 FCC Rcd 3524 at 3545 ¶ 48 (1995).

¹⁸⁹ We have described the must-carry/retransmission consent provisions of the Act and our rules at Section V.B., *supra*.

¹⁹⁰ *Comcast-AT&T Order*, 17 FCC Rcd at 23258 ¶ 34; *EchoStar-DirectTV HDO*, 17 FCC Rcd 20653 ¶ 248.

¹⁹¹ *EchoStar-DirectTV HDO*, 17 FCC Rcd 20654 ¶ 249 (citing *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, 16 FCC Rcd 17312, 17321-22 (2001) ("*Ownership Further Notice*").

¹⁹² Such rate cards are not publicly available.

¹⁹³ *EchoStar-DirectTV HDO*, 17 FCC Rcd 20654 ¶ 249 (citing *Ownership Further Notice*, 16 FCC Rcd at 17322).

¹⁹⁴ *EchoStar-DirectTV HDO*, 17 FCC Rcd 20654 ¶ 249 (citing *Ownership Further Notice*, 16 FCC Rcd at 17322).

affiliated with the Fox Network.¹⁷¹ News Corp.'s cable programming assets include the Fox News Channel, Speedvision, FX, Fox Movie Channel, and the National Geographic Channel. News Corp. controls a wide array of regional and national sports programming channels, as well as valuable program production assets.¹⁷² News Corps' broadcast stations carry UPN and Fox programming, which includes the World Series and other Major League Baseball post-season games, the 16 National Football Conference ("NFC") teams of the National Football League ("NFL"), and popular shows like "The Simpsons," "American Idol" and "Joe Millionaire."¹⁷³ In addition, News Corp. controls the national broadcast rights to National Association of Stock Car Auto Racing ("NASCAR") races and several major packages of college basketball and football games nationwide.¹⁷⁴

50. In evaluating the potential competitive effects of the transaction, it is necessary to first define the product and geographic markets.¹⁷⁵ A relevant market is defined as a product or group of products and a geographic area in which the product or products are produced or sold such that a hypothetical profit-maximizing monopolist would impose at least a 'small but significant and nontransitory' increase in price, assuming the terms of sale of all other products are held constant.¹⁷⁶

1. Product Markets

51. In analyzing vertical issues in MVPD transactions, as the Applicants note, the Commission has generally examined two separate but related product markets: (1) the acquisition of programming ("the programming market"); and (2) the distribution of programming to consumers ("the distribution market").¹⁷⁷ We agree that the Applicants are significant participants in both of these product markets, and therefore analyze them in detail in this section.

a. MVPD Services

52 *Positions of the Parties.* The Applicants begin by observing that the Commission has previously found that DBS operators compete in a market composed of all MPVD providers,¹⁷⁸ and that

¹⁷¹ FEG 10-K 2003 Annual Report at 7.

¹⁷² News Corp.'s sports networks include Fox Sports World, Fox Sports en Espanol, Fox Sports Digital Networks, and 12 RSNs—Fox Sports Net Arizona, Fox Sports Net Detroit, Fox Sports Net Midwest, Fox Sports Net North, Fox Sports Net Northwest, Fox Sports Net Pittsburgh, Fox Sports Net Rocky Mountain, Fox Sports Net Southwest, Fox Sports Net West, Fox Sports Net West 2, and the Sunshine Network. See Application at Attachment F.

¹⁷³ Application at 47; FEG 10-K 2003 Annual Report at 7, 27. See also FEG Presentation, Bear Stearns Media, Entertainment, and Information Conference, slide 19 (Mar. 4, 2003), available at: <http://www.newscorp.com/investor/download/bearstearns03/sld019.gif> (visited on Dec. 12, 2003).

¹⁷⁴ JCC Comments at 38

¹⁷⁵ *EchoStar-DirectTV HDO*, 17 FCC Rcd at 20605-06 ¶ 106, *Comcast-AT&T Order*, 17 FCC Rcd 23260-61 ¶ 42.

¹⁷⁶ DOJ/FTC Guidelines § 1.0

¹⁷⁷ Application at 47 (citing 2002 Annual Video Competition Report, 17 FCC Rcd. at 26910 (distribution market); *id.* at 26953 (programming market), *MCIT*, 16 FCC Rcd. at 21613-14 (1999) (finding that DBS operators "compete in two product markets").

¹⁷⁸ Application at 44

3. Must-Carry and Retransmission Consent

46. In adopting the mandatory carriage provisions of the 1992 Cable Act, Congress recognized the importance of local television broadcast stations as providers of free local news and public affairs programming.¹⁵⁶ Congress found that cable service was rapidly penetrating television households, and increasingly was competing with free over-the-air television for advertising dollars.¹⁵⁷ Congress recognized that television broadcast stations rely on advertising dollars to provide free over-the-air local service, and that competition from cable television posed a threat to the economic viability of television broadcast stations, and mandated cable carriage to ensure the continued economic viability of free local broadcast television.¹⁵⁸

47. Pursuant to these rules, commercial television broadcast station signals are carried by their local MVPDs pursuant to either mandatory carriage or retransmission consent.¹⁵⁹ For cable systems, a broadcast station is entitled to mandatory carriage (*i.e.* "must-carry") on all cable systems within their local markets.¹⁶⁰ Where a television broadcast station has elected must-carry, the cable operator is not required to compensate the broadcaster.¹⁶¹ Alternatively, the station and the cable operator can negotiate the terms of carriage through retransmission consent negotiations.¹⁶² The must-carry obligations of DBS operators differ slightly from those of cable operators. In markets where a DBS operator carries any station to subscribers within the station's local market (*i.e.*, "local-into-local" carriage), pursuant to the Statutory Copyright license all broadcast stations in the market have a right to mandatory carriage by that DBS operator (*i.e.* the "carry-one, carry-all" requirement).¹⁶³ Broadcasters also have the option of negotiating terms of retransmission with the DBS operator. Under the Act and the Commission's rules, television stations are prohibited from entering into exclusive retransmission agreements, and must negotiate in good faith with MVPDs.¹⁶⁴ By statute, the exclusivity and good faith negotiation

(Continued from previous page) _____

Commission's rules. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 4415, 4418-19 ¶ 24 (1994).

¹⁵⁶ House Committee on Energy and Commerce, H.R.Conf.Rep. No. 102-862 ("Conference Report"), 102d Cong., 2d Sess (1992), reprinted at 138 Cong. Rec H8308 (Sept. 14, 1992) at 2.

¹⁵⁷ Conference Report at 3.

¹⁵⁸ Conference Report at 3.

¹⁵⁹ Noncommercial television stations do not have retransmission consent rights

¹⁶⁰ 47 C.F.R. § 76.56.

¹⁶¹ 47 C.F.R. § 76.60.

¹⁶² 47 C.F.R. § 76.64.

¹⁶³ 47 C.F.R. § 76.66.

¹⁶⁴ See 47 U.S.C. § 325(b)(3)(C); 47 C.F.R. § 76.65; *Implementation of Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues. Good Faith Negotiation and Exclusivity* 15 FCC Rcd 5445, 5463 ¶ 45 ("Good Faith Negotiation Order").

critical to ensure competition and diversity in the satellite programming and MVPD markets by prohibiting permanent foreclosure of satellite cable programming and requiring non-discrimination in its provision by vertically integrated cable operators and satellite cable programming vendors. As required in the statute, the Commission, in 2002, examined the developments and changes in the MVPD marketplace in the ten years since the enactment of the program access statute.¹³⁹ The Commission concluded that the competitive landscape had changed for the better since 1992, but that vertically integrated programmers continued to have the incentive and ability to favor affiliated cable operators over other MVPDs.¹⁴⁰

42. The program access rules specifically prohibit cable operators, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite cable programming vendor from:

- Engaging in unfair acts or practices which hinder significantly or prohibit an MVPD from providing satellite cable programming to subscribers or consumers.¹⁴¹
- Discriminating in the prices, terms and conditions of sale or delivery of satellite cable programming.¹⁴²
- Entering into exclusive contracts with cable operators unless the Commission finds the exclusivity to be in the public interest.¹⁴³

43. Aggrieved entities can file a complaint with the Commission.¹⁴⁴ Remedies for violations of the rules may include the imposition of damages and the establishment of reasonable prices, terms and conditions for the sale of programming.¹⁴⁵ Broadcast programming is not subject to the program access rules.

44. The Commission's 2002 examination of whether the exclusivity prohibition should sunset placed substantial weight on whether, in the absence of the exclusivity prohibition, vertically integrated programmers would currently have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and program distributors using other technologies and, if they would, whether such behavior would result in a failure to protect and preserve competition and diversity in the distribution of video programming.¹⁴⁶ Commission held that access to all vertically integrated satellite

¹³⁹ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 17 FCC Rcd 12123 (2002) ("Program Access Order").

¹⁴⁰ *Program Access Order*, 17 FCC Rcd at 12153.

¹⁴¹ 47 C.F.R. § 76.1001.

¹⁴² 47 C.F.R. § 76.1002(b).

¹⁴³ 47 C.F.R. § 1002(b)(4). The exclusivity prohibition sunsets on October 5, 2007, unless extended by the Commission 47 C.F.R. § 1002(c)(6).

¹⁴⁴ 47 C.F.R. § 76.1003

¹⁴⁵ 47 C.F.R. § 76.1003(g) and (h).

¹⁴⁶ *Program Access Order*, 17 FCC Rcd at 12130 ¶15.

38. In assessing the public interest, we consider the record and accord the appropriate level of deference to Executive Branch expertise on national security and law enforcement issues.¹²⁶ As the Commission stated in the *Foreign Participation Order*, foreign participation in the U.S. telecommunications market may implicate significant national security or law enforcement issues uniquely within the expertise of the Executive Branch.¹²⁷ In the context of this particular proceeding, we consider these concerns independent of our own separate analysis. Therefore, in accordance with the request of the Executive Agencies, in the absence of any objection from the Applicants, and given the discussion above, we condition our grant of the Applications on compliance with the following conditions: (i) GM causing Hughes to adopt, and Hughes adopting, prior to the closing of the subject transaction, the Hughes By-law Amendment; (ii) the adoption by the Board of Directors of News Corp. of the Proposed Resolutions; and (iii) compliance by Hughes and News Corp., respectively, with the commitments set forth in the Hughes By-laws Amendment, the Proposed Resolutions, and the Letter Agreement¹²⁸

V. INTRODUCTION TO THE VIDEO PROGRAMMING AND MVPD MARKETS

A. Background

39. The proposed transaction involves the acquisition by News Corp., a major owner of both broadcast and cable video programming content and programming-related technologies, of a 34% interest in Hughes Electronics, owner of DirecTV, a DBS provider that is the second largest MVPD in the United States and the largest MVPD that has a national service footprint. News Corp. presently has no MVPD assets in the United States; its primary domestic business is the provision of video programming to MVPDs in every area of the country. Similarly, Hughes currently does not participate in the video programming market as a programming supplier;¹²⁹ rather, its DirecTV subsidiary functions purchaser and distributor of multichannel video programming to subscribing customers.¹³⁰ By acquiring DirecTV, News Corp. immediately transforms itself from a supplier of video programming MVPDs to a vertically integrated MVPD competitor. News Corp. thus becomes a vertically integrated supplier of broadcast and cable video programming to all of its MVPD competitors in every region of the country.

40. Applicants have alleged that a combination of economic forces, existing regulatory constraints and their own program access and program carriage commitments will suffice to protect competition and consumers against potential competitive harms arising from the transaction.¹³¹ Commenters and opponents argue, among other things, that News Corp.'s acquisition of a controlling

¹²⁶ See *Foreign Participation Order*, 12 FCC Rcd at 23919-21 ¶¶ 61-66.

¹²⁷ See *Foreign Participation Order*, 12 FCC Rcd at 23919 ¶ 62.

¹²⁸ See Appendix E. A complete list of all the conditions imposed on the Applicants is contained in Appendix F.

¹²⁹ Although Hughes does not supply programming content, it is involved in the provision of fixed satellite services ("FSS") through PanAmSat. Most distribution of video programming to MVPD service providers (and to over-the-air television broadcasters) is carried over FSS. PanAmSat is a significant provider of FSS services and is 81% owned by Hughes. The impact of the transaction on FSS is discussed at Section VI.C.4.e below.

¹³⁰ Hughes' only programming interest is a 5% passive equity interest in the Hallmark Channel. See Application at 46.

¹³¹ Application at 47-48; Applicants' Reply at iii-iv.

34. EchoStar argues that before granting the instant Application, the Commission should be satisfied that Australia provides effective competitive opportunities to U.S. companies to provide the same services News Corp. would be authorized to provide in the United States.¹¹⁴ We are not persuaded by EchoStar's arguments that there is a need in this case for the Commission to take steps to ensure that U.S. companies can compete effectively in Australia.¹¹⁵ The nature of our inquiry here focuses on whether the provision of Title III services by a U.S. licensee (with a controlling interest held by a foreign incorporated entity) would harm competition in the U.S. market. EchoStar's argument, at best, advances the position that U.S. licensees could be at a competitive disadvantage in the Australian market due to Australia's statutory and regulatory foreign ownership limitations on subscription television.¹¹⁶ EchoStar does not provide any evidence or arguments to show how Australia's requirements could cause competitive distortions or competitive harm in the U.S. market. For example, EchoStar does not argue or show how News Corp.'s investment could limit competitive choices for U.S. consumers; nor does EchoStar argue or show how the acquisition of a controlling interest in a U.S. licensee by News Corp. could result in increased concentration in the global market, and thereby cause competitive harm in the U.S. market. No evidence was provided, for example, that DirecTV, because of its relationship with News Corp., could provide DBS services to the U.S. market that a U.S.-owned operator could not provide. Based on our review of the record, we find that the proposed acquisition of Hughes by News Corp. is not likely to create competitive distortions in the U.S. market based upon News Corp.'s incorporation or activities in Australia.¹¹⁷

C. National Security, Law Enforcement, Foreign Policy and Trade Policy Concerns

35. As part of our public interest analysis, our review takes into consideration concerns relating to national security, law enforcement, foreign policy and trade policy that may present public interest harm, including any such issues raised by the Executive Branch.¹¹⁸ If the Executive Branch raises

¹¹⁴ EchoStar Petition at 47.

¹¹⁵ *Id.* at 46-50

¹¹⁶ *Id.* at 48-50. In response to EchoStar's arguments, the Applicants submit that the Australian foreign ownership provisions are similar to the U.S. limitations imposed on direct foreign investment in U.S.-licensed broadcast and common carrier licensees under Section 310(b)(3) of the Act, and that under Australian law, there is no limit on or prohibition against foreign control of a subscription DTH licensee company. By contrast, the Applicants contend that under U.S. law, even indirect ownership in a broadcast or common carrier licensee is presumptively limited to no more than a non-controlling 25% interest absent authorization from the Commission to exceed that benchmark. Thus, Applicants state, that taken as a whole, the Australian subscription DTH market is at least as open to foreign investors as is the U.S. market. See Applicants' Sept. 5 Ex Parte at 5, 6.

¹¹⁷ According to the Applicants, News Corp. conducts its business activities principally in the United States, Continental Europe, the United Kingdom, Australia, Asia and the Pacific Basin. In addition, News Corp. states that it derives 7% of its operating income and 8% of its revenues from a combined Australian/Asian market, and has three members on its Board of Directors who are citizens of Australia and one member on the Executive Management Committee who is a citizen of Australia. See Applicants' Sept. 5 Ex Parte at 2-4; see also Application, Attachment C.

¹¹⁸ See *DISCO II Order*, 12 FCC Rcd at 24170-72. See also, e.g., *Lockheed Martin Global Telecommunications, Inc., et al.*, 16 FCC Rcd 20502, 20508-20510 ¶¶ 12, 16 (2001); *Orion*, 5 FCC Rcd at 4939 ¶ 20; *Application of General Electric Capital Corporation and SES Global S.A. for Consent to Transfer Control of Licenses and Authorizations Pursuant to Section 214(a) and 310(d) of the Communications Act*, 16 FCC Rcd 17575, n.78 (continued....)

ECO-Sat test to U.S. licensed systems would not make any sense as a matter of policy, especially in view of the Commission's 2002 DBS Report and Order,⁹⁸ which found that there was "no public policy justification for imposing foreign ownership restrictions on DBS providers," in part because such restrictions would prevent DBS from achieving a "more equal regulatory basis with cable," which is not subject to any foreign ownership restrictions.⁹⁹ Alternatively, the Applicants argue that even if the ECO-Sat test did apply, the Commission should find that there is no foreign ownership issue in this proceeding because News Corp.'s "home market" is the United States.¹⁰⁰

31. *Discussion.* Because of the foreign ownership interests presented in this case,¹⁰¹ we first consider the applicability of Section 310(a) and (b) of the Act.¹⁰² We find that neither provision applies to the proposed transaction. No foreign government or its representative would hold any of the subject licenses. Thus, our review does not fall under Section 310(a) of the Act, which prohibits "any foreign government or the representative thereof" from holding a license.¹⁰³ Further, the Application before us involves the transfer of control of earth station licenses, space station licenses for provision of FSS and DBS service, and wireless licenses, all of which are held, and are to be transferred, on a non-common carrier basis.¹⁰⁴ Thus, we find that the proposed transaction does not involve a "broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license," and the statutory provisions of Section 310(b) of the Act do not apply.¹⁰⁵

32. However, in the 2002 DBS Report and Order, the Commission stated that although it would not impose additional foreign ownership rules on providers of DBS subscription services beyond those

⁹⁸ See *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11311, 11348 (2002) ("2002 DBS Report and Order").

⁹⁹ Applicants' Reply at 68, citing 2002 DBS Report and Order, 17 FCC Rcd at 11348.

¹⁰⁰ See Applicants' Sept 5, 2003 Ex Parte at 2-4

¹⁰¹ News Corp. is incorporated under the laws of South Australia with securities that are publicly traded on both the New York Stock Exchange and the Australian Stock Exchange. See Application at 7

¹⁰² See 47 U.S.C. § 310(a) and (b).

¹⁰³ See 47 U.S.C. § 310(a).

¹⁰⁴ See Application at 5 n 7 & 16 n.30. Subscription DBS service is a "non-broadcast" service and where subscription DBS service is provided on a non-common carrier basis Section 310(b) of the Act does not apply. See *Subscription Video Order*, 2 F.C.C.2d 1001, 1007 (1987), *aff'd*, *National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988); *Subscription Video Order Services*, 4 FCC Rcd 4948 (1989); *MCI Telecommunications Corp.*, 11 FCC Rcd 16275 (IB 1996); *Application of MCI Telecommunications Corp., et. al.*, 14 FCC Rcd 11077 (IB 1999).

¹⁰⁵ Because section 310(b) does not apply to the proposed transaction, we need not consider whether News Corp.'s acquisition of a controlling interest in the subject licenses is consistent with the Commission's decision in *Fox Television Stations* or is otherwise consistent with the public interest under section 301(b)(4) of the Act. See *Fox Television Stations, Inc.*, Second Memorandum Opinion and Order, 11 FCC Rcd 5714 (1995) (*Fox II*) (subject to certain limitations, allowing FTS, as presently structured, to make future indirect investments in broadcast licensees notwithstanding News Corp.'s ownership of FTS in excess of the 25 percent benchmark for indirect foreign ownership set by section 310(b)(4)) See also *UTV of San Francisco Order*, 16 FCC Rcd at 14977-80.

adjudicated. As we do not typically give consideration to pending matters not involving FCC-related misconduct in reaching character determinations, it would be inappropriate to rely on these pending matters as a basis for delaying resolution of the instant Application.⁸² Indeed, holding this proceeding in abeyance on the grounds advocated by EchoStar would only create uncertainty, delay, and expense that would disserve the public interest

26. Finally, EchoStar's assertion that News Corp. failed to report the criminal investigation of NDS's activities on FCC Form 312 lacks merit. The Commission's rules do not impose upon applicants a requirement to report *pending* criminal investigations,⁸³ nor does the application filed in this proceeding, FCC Form 312, require specific disclosure of *pending* criminal matters *prior* to conviction.⁸⁴ The pending matters referred to in question 39 of FCC Form 312 relate to cases where there has been a conviction (as may be listed in response to question 37) or adjudication of guilt (as may be listed in response to question 38) of the party to the application or of a party directly or indirectly controlling the applicant.⁸⁵

B. Foreign Ownership

27. *Background* Generally, foreign ownership interests in Title III licensees are governed by Section 310(a) and (b) of the Act.⁸⁶ The policies and rules implementing these foreign ownership provisions with respect to satellite services are largely articulated in the *DISCO II Order*, and support the Commission's policy objectives of promoting competition in the U.S. market and achieving a more competitive global satellite market.⁸⁷ The *DISCO II Order* and a companion decision, the *Foreign Participation Order*,⁸⁸ are the initial Commission decisions implementing market opening commitments made by the United States in the World Trade Organization ("WTO") Agreement on Basic Telecommunications Services ("WTO Basic Telecom Agreement"),⁸⁹ and remain central to the Commission's overall foreign ownership policy today.

⁸² See *Character Policy Statement 1986*, 102 F.C.C.2d 1205.

⁸³ See 47 C.F.R. § 1.65.

⁸⁴ See *Lockheed Martin Corp., et al.*, 17 FCC Rcd 13160, 13166 ¶ 16 (2002). See also Application for Space and Earth Station Authorizations For Transfer of Control or Assignment, FCC 312 Main Form ("FCC Form 312"), which requires that an applicant or any party directly or indirectly controlling the applicant inform the Commission of a conviction of a felony in any state or federal court (question 37) or a court's final adjudication of unlawful monopolization or unfair methods of competition (question 38). See FCC Form 312, Questions 37, 38.

⁸⁵ See *Lockheed Martin Corp., et al.*, 17 FCC Rcd 13160, 13166 ¶ 16 (2002). Question 39 of FCC Form 312 asks whether the applicant, or any person directly or indirectly controlling the applicant, is currently a party in any pending matter referred to in the preceding two items (*i.e.*, questions 37 and 38). See FCC Form 312, Question 39.

⁸⁶ 47 U.S.C. § 310(a) and (b).

⁸⁷ See *DISCO II Order*, 12 FCC Rcd at 24097.

⁸⁸ See *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd 23891, 23894 (1997) (*Foreign Participation Order*); *Order on Reconsideration*, 15 FCC Rcd 18158 (2000).

⁸⁹ This agreement, which became effective on January 1, 1998, is centered on the principles of open markets, private investment, and competition. See *DISCO II Order*, 12 FCC Rcd at 24096.

corporate sabotage and satellite signal piracy; violations of the California unfair competition statute, the Digital Millennium Copyright Act ("DMCA"), and the Communications Act of 1934; breach of contract, fraud, breach of warranty and misappropriation of trade secrets.⁶⁵

21. EchoStar argues that the pending federal criminal investigation and civil litigation cases involve matters that should be of paramount concern to the Commission.⁶⁶ In addition, EchoStar maintains that a possible finding that NDS has engaged in such alleged activities would be highly relevant to the application of the Commission's character policy to News Corp.'s qualifications.⁶⁷ Thus, EchoStar submits that the Commission should put the current proceeding on hold while it undertakes its own investigation of these factual allegations⁶⁸ or at least await the outcome of the criminal investigation.⁶⁹ EchoStar surmises that, in the alternative, should the U.S. Attorney General's investigation result in a felony conviction, the Commission would be faced with an extremely burdensome license revocation proceeding.⁷⁰ Finally, EchoStar asserts that News Corp. failed to report the criminal investigation of NDS's activities on its FCC Form 312 Application in this proceeding even though these facts are directly relevant to the Commission's analysis of its qualifications.⁷¹

22. In response, the Applicants point out that EchoStar took the opposite position on the relevance of pending such proceedings just last year when its own qualifications were challenged in connection with its plan to merge with Hughes, based on its alleged failure to engage in collective bargaining and other labor law concerns.⁷² The Applicants point out that in that case, the Commission held that any "unadjudicated non-FCC violations" as to EchoStar "should be resolved by the governmental agency with proper jurisdiction."⁷³

23. *Discussion.* The Commission has long held that character qualifications of an applicant or licensee are relevant to the Commission's public interest analysis and that an applicant's or licensee's willingness to violate other laws, and in particular to commit felonies, also bears on our confidence that an applicant or licensee will conform to FCC rules and policies. To this end, the Commission has determined that, in deciding character issues, it will consider certain forms of adjudicated, non-FCC related misconduct that includes: (1) felony convictions; (2) fraudulent misrepresentations to

⁶⁵ *Id.*

⁶⁶ EchoStar Petition at 51.

⁶⁷ *Id.* at 52.

⁶⁸ *Id.* at 56-57.

⁶⁹ EchoStar contends that the Commission has repeatedly stayed its hand to await the result of proceedings that implicate issues key to the assessment of an applicant's character *Id.*

⁷⁰ *Id.* at 56.

⁷¹ *Id.* at 57 (citing FCC Form 312, Questions 39, 37)

⁷² Applicants' Reply at 77

⁷³ *Id.* (citing *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20579).

accelerating private sector deployment of advanced services.⁵¹ To apply our public interest test, then, we must determine whether the transaction violates our rules, or would otherwise frustrate implementation or enforcement of the Communications Act and federal communication policy. That policy is shaped by Congress and deeply rooted in a preference for competitive processes and outcomes.⁵²

17. Our determination of the competitive effects of the proposed transaction under the public interest standard is not limited by traditional antitrust principles.⁵³ The Commission and the Department of Justice ("DOJ") each have independent authority to examine communications transactions involving mergers and acquisitions, but the standards governing the Commission's review differ from those of DOJ.⁵⁴ The review conducted by DOJ is pursuant to Section 7 of the Clayton Act, which prohibits transactions that are likely to substantially lessen competition in any line of commerce.⁵⁵ The Commission, on the other hand, is charged with determining whether the transaction serves the broader public interest.⁵⁶

⁵¹ See 47 U.S.C. §§ 157 nt, 254, 332(c)(7), Telecommunications Act of 1996, Preamble; *Comcast-AT&T Order*, 17 FCC Rcd at 23255; *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20575; *AT&T-MediaOne Order*, 15 FCC Rcd at 9821; cf. 47 U.S.C. §§ 521(4), 532(a).

⁵² See, e.g., *MCI Telecommunications Corporation and EchoStar 110 Corporation*, Order and Authorization, 16 FCC Rcd 21608 (1999) (quoting *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, 14 FCC Rcd 3160 at ¶ 14 (1999) ("AT&T-TCI Order")).

⁵³ See *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20575 (citing *Satellite Business Systems*, 62 F.C.C 2d 997, 1088 (1977) *aff'd sub nom United States v. FCC*, 652 F.2d 72 (DC Cir., 1980) (*en banc*), *Northern Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agencies "to analyze proposed mergers under the same standards that the Department of Justice . . . must apply"))).

⁵⁴ See *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20575, *AT&T-TCI Order*, 14 FCC Rcd at 3168-69.

⁵⁵ 15 U.S.C. § 18

⁵⁶ For example, under our Section 310(d) public interest analysis, we consider whether the transaction is consistent with the Commission's policies to advance diversity. It has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." See, e.g., *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972). Our public interest analysis may also consider whether the proposed transfer of control will affect the quality of communications services or will result in the provision of new or additional services to consumers (see *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20575; *AT&T-MediaOne Order*, 15 FCC Rcd at 9821); whether the applicant has the requisite "citizenship, character, financial, technical, and other qualifications" to hold a Commission license (see, e.g., 47 U.S.C. §§ 310(d) and 308(b)); and we may, in appropriate cases, take foreign ownership into account to determine whether there are public interest harms resulting from foreign investment in Title III licensees. This consideration is in addition to our review of foreign ownership that may otherwise be required under Section 310(a) and (b) of the Act. See, e.g., *Orbital Communications Corporation and ORBCOMM Global, L.P. (Assignors) and ORBCOMM License Corp and ORBCOMM LLC (Assignees)*, 17 FCC Rcd 4496, 4506-07 (IB 2002) ("Orbcomm Order"). Finally, where necessary, we may also consider whether the transaction raises issues of national security, law enforcement, foreign policy and trade policy, including any such concerns that may be raised by the Executive Branch. See *Amendment of the Commission's Regulatory Policies to Allow Non-US Licensed Space Stations to Provide Domestic and International Service in the United States*, 12 FCC Rcd 24094, 24170 (1997) ("DISCO II Order").

12. *The Merger.*³⁵ News Corp. will form a new subsidiary specially created to merge with Hughes ("merger subsidiary"). Immediately following the split-off and stock purchase described above, the merger subsidiary will merge with and into Hughes, with Hughes being the surviving corporation.³⁶ In connection with the merger, News Corp. will acquire from the former GMH shareholders an additional 14.1% of Hughes for \$14 per share payable at News Corp.'s election in the form of News Corp. preferred ADRs, cash, or a combination of preferred ADRs and cash.³⁷ As a result of the merger, each former GMH shareholder will receive for each of their Hughes shares owned, consideration of which approximately 82.4% will consist of equity in Hughes and 17.6% will consist of News Corp. preferred ADRs and/or cash.³⁸ Automatically upon consummation of the merger, the Hughes Class B common stock acquired by News Corp. from GM will be converted on a share-for-share basis into Hughes common stock with no class. The consequence of these transactions is that after the merger, News Corp. will hold 34% of Hughes common stock and the former GMH shareholders will hold 66% of Hughes common stock.³⁹ Immediately following the merger, the shares of Hughes acquired by News Corp. will be transferred to FEG or a wholly-owned subsidiary of FEG for a combination of a promissory note and stock in FEG. The acquisition of this stock will increase News Corp.'s ownership interest in FEG, currently 80.6%, to approximately 82%.⁴⁰

13. *The Resulting Ownership and Management Structure*⁴¹ As a result of the proposed transactions, Hughes will become an independent company incorporated in the United States with a single class of publicly traded common stock. News Corp., through its FEG subsidiary, will control the single largest block of shares in Hughes with a 34% interest. The remaining 66% interest in Hughes will be held by the former owners of GMH shares. Of this public shareholding, trusts established under various GM employee benefit plans will hold, in the aggregate, an approximately 20% interest.⁴² The United States Trust Company of New York ("US Trust") serves as the independent trustee of each of those trusts with respect to such shares, and is therefore expected to initially hold, in the aggregate, approximately 20% of the voting power of Hughes common stock. Subject to its fiduciary duties as trustee, US Trust will have sole discretion in exercising those voting rights. The remaining shares will be widely held by the public. Hughes will continue to own indirectly approximately 81% of the shares of PanAmSat. After the transaction, GM will no longer hold any shares of Hughes common stock.⁴³

³⁵ See Application, Volume II, Merger Agreement.

³⁶ See Application at 12.

³⁷ *Id*

³⁸ *Id*

³⁹ *Id*

⁴⁰ *Id*

⁴¹ See Application, Volume I, D, Hughes Simplified Ownership Structure of FCC Licenses (Post-Transaction), Principal Ownership List, Officers and Board of Directors.

⁴² See Application at 12.

⁴³ *Id* at 13

B. General Motors Corporation and Hughes Electronics Corporation

8. Hughes, a Delaware corporation, is a wholly owned subsidiary of GM, also a Delaware corporation.¹⁹ Hughes holds a number of Commission licenses and authorizations directly or through its wholly- or majority-owned subsidiaries.²⁰ Hughes' wholly-owned subsidiaries include both DirecTV, the parent company of DirecTV Enterprises, LLC, and United States Satellite Broadcasting Company, Inc., both Commission DBS licensees.²¹ DirecTV currently provides service to U.S. consumers from seven DBS satellites using 32 channels at 101° W.L. orbital location, three channels at 110° W.L. orbital location, and 11 channels at 119° W.L. orbital location.²² In the United States, DirecTV, together with certain independent distributors, have approximately 11.9 million DBS subscribers.²³ HNS also is a wholly-owned subsidiary of Hughes and holds a number of authorizations for transmit/receive earth stations and VSAT networks for use of frequencies in the C- and Ku-bands, as well as authorizations for the construction, launch and operation of the Ka-band SPACEWAY Satellite System.²⁴ Hughes also indirectly holds an approximately 81% economic and voting interest in PanAmSat, a publicly traded Delaware corporation and the corporate parent of PanAmSat Licensee Corp., a Commission licensee that holds authorizations to operate fixed satellite service systems using the C- and Ku-bands, as well as authorizations for numerous earth stations which are licensed to transmit and receive frequencies in the C- and Ku-bands.²⁵

¹⁹ GM has issued a publicly traded tracking common stock (GM Class H common stock) designed to provide shareholders with financial returns based on the economic performance of the business and assets of GM's wholly-owned Hughes subsidiary. See General Motors Corp., SEC Form 10-K, Annual Report for the fiscal year ended Dec. 31, 2002 ("*GM 10-K 2002 Annual Report*"), see also Hughes Electronic Corp., SEC Form 10-K, Annual Report for the fiscal year ended Dec. 31, 2002 ("*Hughes 10-K 2002 Annual Report*").

²⁰ A complete list of licenses and authorizations held by Hughes and subject to this transfer of control Application is set forth in the Application, Volume I, A.

²¹ See *Hughes 10-K 2002 Annual Report* at 3, 85.

²² See *Tempo Satellite Inc. and Hello Enterprises, Inc.*, 14 FCC Rcd 7946 (IB 1999) ("*Tempo-Hello Order*"); see also *Hello Enterprises, Inc.*, 7 FCC Rcd 2728 (IB 1992) and 7 FCC Rcd 6597 (IB 1992).

²³ Of these, approximately 10.3 million subscribe directly to DirecTV, while the remainder subscribe through the National Rural Telecommunications Cooperative ("NRTC"). See Hughes Electronic Corp., SEC Form 10-Q, Quarterly Report for the period ending Sep. 30, 2003 at 32, 37 ("*Hughes 10-Q September 2003 Report*"). Hughes also has an interest in direct-to-home ("DTH") and other satellite services in several foreign countries. See *Hughes 10-K 2002 Annual Report* at 3-4. Licenses for the services provided in foreign countries, however, are not part of the proposed transaction. See Application at 6, n.12.

²⁴ See *Hughes 10-K 2002 Annual Report* at 4.

²⁵ See PanAmSat Corp., SEC Form 10-K, Annual Report for the fiscal year ended Dec. 31, 2002 at 2 ("*PanAmSat 10-K 2002 Annual Report*"); see also *Hughes 10-K 2002 Annual Report* at 4. See *Hughes Communications, Inc.*, 12 FCC Rcd 7534 (1997). With the exception of six satellite earth station licenses held by PanAmSat, none of the licenses controlled by Hughes is a common carrier or broadcast radio license. See Application at 5, n.7. The Commission granted PanAmSat's applications to remove the common carrier designation from its earth station licenses earlier this year. See FCC Public Notice, Report No. SES-00506 (rel. Jun. 11, 2003) (notice of grant of applications SES-MOD-20030425-00533; SES-MOD-20030425-00534; SES-MOD-20030425-00537); FCC Public Notice, Report No. SES-00510 (rel. Jun. 25, 2003) (notice of grant of applications SES-MOD-20030425-00535 and SES-MOD-20030425-00536; FCC Public Notice, Report No. SES-00514 (rel. Jul. 9, 2003) (notice of (continued ..)

II. DESCRIPTION OF THE PARTIES

A. The News Corporation Limited

6. News Corp. is a corporation formed under the laws of South Australia with securities that are publicly traded on both the New York Stock Exchange and the Australian Stock Exchange.⁵ News Corp. is a diversified international media and entertainment company with operations in a number of industry segments, including: filmed entertainment, television, cable network programming, magazines and inserts, news papers, and book publishing.⁶ Shareholders holding a greater than 10% interest in News Corp. are K. Rupert Murdoch, a U.S. citizen and chief executive of News Corp., who directly and indirectly controls an approximately 16% equity and 30% voting interest in News Corp.,⁷ and Liberty Media Corporation ("Liberty"), a Delaware corporation, which holds preferred limited voting ordinary shares representing approximately 17.6% of the shares of News Corp. but with no voting rights except in limited instances.⁸ Liberty holds interests in domestic and international video programming, interactive technology services, and communications businesses in the United States, Europe, Latin America, and Asia.⁹ Among its holdings are majority ownership interests in Starz Encore Group LLC (100%) and

⁵ See Application, Volume I, C for a chart summarizing the relevant News Corp. ownership structure prior to the proposed transaction; see also News Corporation Limited, SEC Form 20-F, Annual Report for the fiscal year ended June 30, 2003 at 5, 72 ("*News Corp. 20-F 2003 Annual Report*").

⁶ See *News Corp 20-F 2003 Annual Report* at 5

⁷ This approximate percentage is calculated based on 2,097,473,050 ordinary shares outstanding on Sep. 30, 2003, and includes ordinary shares owned by: (1) K. Rupert Murdoch; (2) Cruden Investments, Limited, a private Australian investment company owned by K. Rupert Murdoch, members of his family and various corporations and trusts, the beneficiaries of which include K. Rupert Murdoch, members of his family and certain charities; and (3) corporations which are controlled by trustees of settlements and trusts established for the benefit of the Murdoch family, certain charities, and other persons. In addition, K. Rupert Murdoch, Cruden Investments, Limited and such other entities beneficially own 217,126,040 preferred limited voting ordinary shares. See *News Corp. 20-F 2003 Annual Report* at 5, 70.

⁸ A holder of News Corp. preferred limited voting ordinary shares is entitled to vote on: a proposal to reduce the share of capital of the company; on a proposal to wind up or during the winding-up of a company; a proposal for the disposal of the whole of the property, business, and undertaking of the company; a proposal that affects rights attached to such preferred shares, a resolution to approve the terms of a buy-back agreement; and during a period in which a dividend (or part of a dividend) in respect of the preferred shares is in arrears. See *News Corp 20-F 2002 Annual Report* at p. F-39, see also Liberty Media Corporation, SEC Form 10-K, Annual Report for the fiscal year ended Dec. 31, 2002 at p. I-6 ("*Liberty 10-K 2002 Annual Report*"). On October 6, 2003, the News Corp. notified the Commission that Liberty had exercised its right to purchase \$500 million in News Corp. preferred limited voting ordinary American Depositary Receipts ("ADRs"), increasing Liberty's passive interest in News Corp. from approximately 17.6% to approximately 19% of the company's issued and outstanding stock. If News Corp. were to exercise its right to offer ADRs as consideration in connection with its acquisition of an interest in Hughes to the maximum extent permissible under the documents governing the proposed transaction, Liberty's ownership interest in News Corp. would be diluted to approximately 17.3%, based on current stock prices. See Letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP to Marlene H. Dortch, Secretary, FCC (Oct. 6, 2003).

⁹ See *Liberty 10-K 2002 Annual Report* at p. I-1. On May 12, 2003, EchoStar Satellite Corporation ("EchoStar") filed a Petition to Require Additional Information requesting that the Commission require the Applicants to submit information concerning the planned involvement of Liberty in the financing of the proposed purchase by News Corp. in Hughes. See *EchoStar Petition to Require Additional Information*, May 12, 2003 at 2-5. EchoStar also (continued....)

I. INTRODUCTION

1. In this Order, we consider the application ("Application")¹ of General Motors Corporation ("GM"), Hughes Electronics Corporation ("Hughes"), and the News Corporation Limited ("News Corp.") (collectively, the "Applicants") for consent to transfer control of various Commission licenses and authorizations, including direct broadcast satellite ("DBS")² and fixed satellite space station, earth station, and terrestrial wireless authorizations held by Hughes and its wholly- or majority-owned subsidiaries to News Corp. The proposed transaction involves the split-off of Hughes from GM, wherein Hughes will become a separate and independent company, followed by a series of transactions through which News Corp., through its majority-held subsidiary, Fox Entertainment Group ("FEG"), will acquire a 34% interest in Hughes. The remaining 66% interest in Hughes will be held by three GM employee benefit trusts (managed by an independent trustee), which combined will hold an approximately 20% interest in Hughes, and by the general public, which will hold an approximately 46% interest in Hughes.

2. If approved, the proposed transaction will result in News Corp. holding the single largest block of shares in Hughes, thus providing News Corp. with a *de facto* controlling interest over Hughes and its subsidiaries, including DirecTV Holdings, LLC ("DirecTV"), a wholly-owned subsidiary of Hughes, which provides DBS service in the United States, as well as Hughes Network Systems, Inc. ("HNS"), a facilities-based provider of very small aperture terminal ("VSAT") network systems, and PanAmSat Corporation ("PanAmSat"), a global facilities-based provider of geostationary-satellite orbit fixed satellite services ("FSS"). As described in the Application, if the proposed transaction is consummated, K. Rupert Murdoch, chairman and chief executive officer ("CEO") of News Corp., will become chairman of Hughes, and Chase Carey, News Corp.'s former co-chief operating officer, will become president and chief executive officer of Hughes. Hughes' board of directors will consist of 11 directors, six of whom will be independent directors.

3. Among News Corp.'s video programming assets are 35 owned and operated ("O&O") full-power television broadcast stations, a television broadcast network, ten national cable programming networks, and 22 regional cable programming networks. With 11.4 million subscribers – 13% of all multichannel video programming distribution ("MVPD") households – DirecTV is second only to Comcast Corporation in its share of the MVPD market. With its national footprint, DirecTV competes with every single MVPD in the country, in markets of all sizes.

4. Currently, News Corp. supplies programming to DirecTV and other MVPDs, and DirecTV is a buyer of programming content from News Corp. and other programming suppliers. By combining News Corp.'s programming assets with DirecTV's national distribution platform, the proposed transaction creates a vertically integrated content/distribution platform. It thereby changes the nature of

¹ See *Consolidated Application of General Motors Corporation and Hughes Electronics Corporation, Transferors, and the News Corporation Limited, Transferee, for Authority to Transfer Control*, May 2, 2003 ("May 2003 Filing"). The term, "Application," refers to the *May 2003 Filing* and the letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP to Marlene H. Dortch, Secretary, FCC (May 30, 2003) (clarification of Application). The Media Bureau placed the Application on public notice on May 16, 2003, DA 03-1725, MB Docket No. 03-124, establishing a comment cycle for this proceeding. See Appendix A for a list of parties filing in this proceeding and the abbreviations by which they are identified herein.

² DBS is the acronym used in the United States to describe the domestic implementation of the satellite service known internationally as the broadcasting satellite service ("BSS"). See 47 C.F.R. § 25.201.

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